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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1954

No. 164

PHILIP ANDREW WITMER, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 24, 1954

CERTIORARI GRANTED OCTOBER 14, 1954

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DOCKET ENTRIES

1952

Mar. 20 Indictment: Vio. 50 USCA 451; 462 "Selective Service Act of 1948"; and Proclamation of the President and Selective Service Regulations. in 1 ct.
A True Bill.
JS 2 (00-3).

Mar. 25 Plea: Not guilty.

Mar. 25 Clerk's Minute Sheet of arraignment.

Mar. 27 Jury called to box, and sworn. (See List).

Mar. 27 Clerk's Minute Sheet of Trial. (1/2 day).

Mar. 31 Clerk's Minute Sheet of Trial. (1/2 day).

Mar. 31 Verdict: Guilty.

Apr. 3 Motion for Judgment of Acquittal.

Apr. 3 Copy of letter fixing hearing on motion Apr. 22, 1952, at 11 AM.

Nov. 6 Transcript of Trial on March 27 & 31, 1952. In
Nov. 6 Envelope containing exhibits. Vault.

Dec. 17 Order fixing argument on motion for judgment of acquittal at Scranton, Pa. Tues. Jan. 13, 1953, at 11 A.M. (M).

Dec. 17 Certified copy order mailed counsel of record; also US Attorney.

1953

Jan. 13 Clerk's Minutes Sheet at hearing—argument for Judgment of Acquittal and Motion to Amend Motion for Judgment of Acquittal.

Sept. 25 Opinion denying motion for judgment of acquittal, and Order. (M) Copies of Opinion and Order mailed to counsel of record, and to the Attorney General.

Docket Entries

Oct. 12 Sentence: Imprisonment for a period of Three Years. (M).

Oct. 12 2 Certified copies judgment & commitment handed US Marshal and 1 cc. to US Attorney and 1 cc to Probation Officer.

Oct. 12 Clerk's Minute Sheet re: Sentencing.

Oct. 12 Order denying defendant's oral motion to be admitted to bail pending appeal. (M).

Oct. 12 Certified copies of Order handed to Darlington Hoopes Esq., counsel for defendant, and to US Attorney.

Oct. 12 Notice of Appeal filed in duplicate.

Oct. 13 Letter to Mrs. Ida O. Creskoff, Clerk, US Court of Appeals for Third Circuit, Phil. Pa. enclosing copy of Notice of Appeal and Statement of Docket Entries, Cr. Form No. 27; and copy of letter mailed to US Atty. Scranton, Pa. JS 3-(OT-3).

Oct. 14 Record on Appeal No. 1 to 17 inc. together with Clerk's Certificate mailed Clerk, U. S. Court of Appeals, for the Third Circuit, Philadelphia, Pa.

Oct. 16 Receipt of Clerk U. S. Ct. of Appeals for Record on Appeal above.

Oct. 20 Order, U. S. Court of Appeals, admitting Appellant to bail, pending Appeal, in the sum of $1,000.00. (Maris) (dated 10/19/53).

Oct. 20 Court Appearance Bond in the sum of $1,000.00 with John S. & Ruth C. Johnston, Molington RD1, Brecknock Twp., Berks County, Pa., as surety.

Oct. 20 U. S. Marshal's return of Order, Court of Appeals, executed by producing Deft. before U. S. Comm. Kolb when Deft. furnished bail in the sum of $1,000.00 (MF&E $2.00).

INDICTMENT

The Grand Jury Charges:

On or about the 5th day of December, 1951, in the Middle District of Pennsylvania,

PHILIP ANDREW WITMER,

UNLAWFULLY, KNOWINGLY AND WILFULLY FAILED, neglected and refused to submit to induction into the Armed Forces of the United States as required of him by the Selective Service Act of 1948, 50 U. S. C. A. Appendix 451-470, a Proclamation of the President of the United States, issued and promulgated thereunder July 20, 1948, #2799, 50 U. S. C. A. 453 note, and Selective Service Regulations duly issued pursuant to said Act and then in full force and effect, all as the defendant then and there well knew.

A TRUE BILL

/s/ O. E. McGREGOR,
Foreman

March 20, 1952

/s/ ARTHUR A. MAGUIRE,
United States Attorney.

TRANSCRIPT OF TESTIMONY

BEFORE: Honorable JOHN W. MURPHY, United States District Judge, and a jury at Scranton, Pa., on March 27 and March 31, 1952.

* * *

[Tr. 7]

MRS. LEONORE MOYER, called and sworn on behalf of the Government, on direct and cross-examination, testified as follows:

* * *

REDIRECT EXAMINATION

[Tr. 19]

BY THE COURT:

Now then this notation you say "Board met with registrant. No action taken (see file)." Where is that? That is on the back of the file, the file cover?

BY THE WITNESS:

That is correct.

* * *

[Tr. 20]

BY THE WITNESS:

On the bottom of that page. They told him his appeal would be sent to the appeal board.

BY THE COURT:

"This Board felt this was not sufficient evidence to warrant a 4-D Classification and informed the registrant his case would be sent up to the appeal board following his physical examination." You mean that sentence, do you?

BY THE WITNESS:

That is correct.

* * *

[Tr. 22]

BY THE WITNESS:

It shows the name of the registrant, his Selective Service Number, what classification the registrant is in, the

date he was classified, forwarded to the appeal board on appeal taken by, then the name of the person or the employer, and the date forwarded to the appeal board.

* * *

[Tr. 24]

REDIRECT EXAMINATION

By Mr. Kalp:

Q You testified on cross-examination there is a notation on the back of the questionnaire that he was given a hearing on the 19th and that no action was taken, will you read that?

A "3-19-51 Board met with registrant. No action taken (see note in file)," which referred to the note.

* * *

Q What happened after he—did the Board notify the defendant orally that his classification would not be changed at that time?

A At the end of the Board meeting the registrant was apprised that his 1-A classification would remain the same, his file would be forwarded to the appeal board upon the completion

* * *

[Tr. 26]

By the Court:

Are you certain that the Board said to this young man, as you have testified in answer to Government counsel's question, that someone there apprised—by that I assume you mean advised or informed—the young man that his 1-A classification would remain the same?

By the Witness:

Our Board chairman.

By the Court:

He said that?

Mrs. Leonore Moyer, redirect (Gov't)

BY THE WITNESS:

Yes.

* * *

[Tr. 27]

RECROSS-EXAMINATION

BY MR. HOOPES:

* * *

A Mr. Hoopes, when our Board does not reclassify or classify immediately a registrant who is 1-A at a personal appearance they will tell them at that time they will remain 1-A.

Q You are testifying now because that is the practice of your Board to do that in every case?

A Mr. Haessler, our Board Chairman, does that.

Q That is your regular practice?

A That is correct.

* * *

[Tr. 28]

A. To the best of my knowledge, it was told to Mr. Witmer.

Q Isn't it a fact that at that time Mr. Witmer was told the matter was out of the hands of the local board because he had taken an appeal?

A That is correct.

Q In other words, the local board could not do anything at that time because he had taken an appeal, isn't that what you told him or what the board chairman told him?

A Yes sir, that is correct.

BY THE COURT:

Now you said they told him that. Did they tell him what you said before? You say now they told him they could not take any action because it was on appeal, and you have already told us that they told him that his classification 1-A would remain unchanged?

By the Witness:

That is correct, sir.

* * *

By the Witness:

They told the man his 1-A classification would remain the same, which was 1-A.

* * *

[Tr. 29]

By the Witness:

It seems to me the two statements are not necessarily inconsistent. The local board may have said they would classify him in 1-A because the matter was out of their hands and they couldn't change it.

By the Court:

I want to know why. I want to get the truth of what happened. You have said the local board said they could do nothing because it was out of their hands; you have also said the local board said—the chairman told you—"The board felt this was not sufficient evidence to warrant a 4-D classification and informed the registrant his case would be sent up to the appeal board following his physical examination." Did the chairman say that—that you typed?

By the Witness:

Yes. That was dictated by the chairman.

* * *

[Tr. 37]

By Mr. Hoopes:

* * *

I submit that under the testimony in this case the local board did not classify this registrant anew after he appeared before it personally. They did not mail him the classification, notice of classification, SS Form 110, as required by Paragraph (d), and they thereby denied him the right of appeal from that classification which is set forth in Paragraph (e). And, of course, under Section 1624.3 they had no right to induct him until 10 days after that

notice of classification had been mailed to him as required by Section 1624.2, Sub-Paragraph (d).

* * *

[Tr. 39]

By the Court:

The young lady said it was going to remain the same as it had been and that his appeal would be honored. You say that he would have an appeal from the classification immediately and that they should write him a letter and say "We reclassify you 1-A as you have been heretofore," and then he would have ten days from the day he got the letter?

* * *

[Tr. 40]

By the Court:

Judge Parker, who is a very able Judge, refers to Judge Maris' opinion, and, notwithstanding Judge Maris' opinion, he said that since there was oral notice that the young man was notified and since he had a right to go up with the appeal record, since he could add anything to it he desired by way of statement, said Judge Parker, he is not convinced that Judge Maris' opinion on this proposition where the board gave notice is the law.

* * *

By the Court:

[Tr. 41]

The Fourth Circuit has gone much beyond the Third Circuit historically in protecting these conscientious objectors, and it was the Fourth Circuit doctrine in favor of Jehovah's Witnesses and conscientious objectors that was adopted and followed by the Supreme Court, and the Third Circuit was not nearly as advanced as the Fourth. Now we have the Fourth that was away ahead of the Third, and you say—

* * *

[Tr. 58]

MRS. LEONORE MOYER, recalled.

RECROSS-EXAMINATION (*Cont.*)

BY MR. HOOPES:

* * *

[Tr. 60]

Q Then did the board members ask Mr. Witmer questions about his classification?

A To the best of my knowledge, yes.

Q He answered them?

A He did.

Q That went on for quite a while?

A If I remember correctly, the interview wasn't too long.

Q When you say, "The interview wasn't too long," can you give me an estimate of how long you think it was?

A I would say between fifteen minutes and one-half hour.

Q Well at that time after this questioning had gone on for sometime, did Mr. Witmer on his own personal account present to the board chairman three articles, one, an affidavit, two, a three-page single-spaced typewritten statement signed by himself, and

[Tr. 61]

third, a copy of the *Watchtower* magazine of February 1, 1951?

A Information was presented at the time of the hearing and the interview.

* * *

Q And Mr. Witmer at that time called the attention of the board to an article entitled "Pacifism and Conscientious Objection—Is There a Difference? in that particular copy of the *Watchtower* magazine; you have a copy there. do you not?

Q Yes, that article is in here.

Mrs. Leonore Moyer, recross (Gov't)

* * *

[Tr. 62]

Q Perhaps I can refresh your recollection. It was right after that the board chairmain said, "We can't change your classification, the matter is out of our hands because you have taken an appeal," wasn't it?

A That is correct.

* * *

[Tr. 63]

Q Isn't it also a fact that at that time they agreed that because of his appeal, the matter was out of their hands and they couldn't change his classification?

A That I don't remember.

* * *

Q As soon as the hearing was over, the board chairman made the statement which I quoted twice and which you said is absolutely correct now that "We can't change your classification, the matter is out of our hands because you have taken an appeal?"

A That is correct.

Q They didn't ask Mr. Witmer to step outside while they considered his case?

A No.

* * *

[Tr. 64]

Q Who dictated that entry to you?

A The board chairman, Mr. Charles Haessler.

Q You have also testified that he also dictated to you that document which you have called a "note in file"?

A The summary of the board meeting, that is correct.

* * *

REDIRECT EXAMINATION

By Mr. Maguire:

[Tr. 71]

Q And do you—to clear this up—when was the classification mailed to this young man?

A 2-22-51.

Q 2-22-51. Now within ten days do your records disclose that you received any written communication from this young man?

A They do, sir.

Q Within ten days?

[Tr. 72]

A No, there is an expiration of more than ten days.

Q I will ask the question once again. Do your records disclose that you received any communication from this young man within ten days of your mailing his classification?

A No sir.

Q When is the next notation of receiving anything from this young man?

A March 5, 1951.

Q And that was over ten days from the date of mailing his notice of classification, was it not?

A Correct.

* * *

[Tr. 73]

Q Now, Mrs. Moyer, did this young man ask for a personal appearance within ten days of the mailing of his notice of classification?

A Not within ten days of the receipt of the notice of classification.

Q I think the regulations state that within ten days of the mailing of the notice?

A That is correct, sir.

Q Well, you know when the notice was mailed don't you?

A 2-22-51.

Q Now within ten days after that letter, did you receive any request for a personal appearance?

A No sir.

Q However, in this notice of appeal, which was stamped

by your board and you, it was received on March 5, out of time; he did ask for an appearance, did he not?

A He did, sir.

* * *

RECROSS-EXAMINATION

By Mr. Hoopes:

* * *

[Tr. 74]

Q So that if this communication had arrived at your office on Saturday, March 3, you would not have gotten it until March 5?

A That is correct, sir.

Q And you would have dated it received though as March 5?

A That is right.

Q So that when you say it was not received within ten days, what you mean to say is that you didn't mark it received within ten days?

A I didn't receive it until March 5.

Q You didn't receive it until March 5 personally, but you don't know when it arrived at your office?

A No sir.

Q It may have arrived there on March 3?

A It may have.

* * *

[Tr. 76]

By the Court:

Now then the young man, at any rate, wrote you a letter dated March 1, which you say you stamped with your Board's stamp March 5. In that letter he said: "On the strength of my right to appeal my service classification I wish to state that I am a minister of the gospel. On the strength of this fact I wish to appeal this classification and request a personal appearance to present evidence to this fact." Now then you received that. Was this letter a part

of the file, this letter marked "Government's Exhibit No. 'A,'" was this letter a part of the file when the record was sent to the appeal board?

BY THE WITNESS:

Yes sir.

• • •

[Tr. 77]

BY THE COURT:

Now on examination by Mr. Hoopes, you have said that the board said, "We can't change your classification, the matter is out of our hands, you have taken an appeal," and did the board consider it in this opinion where "the board felt this was not sufficient evidence to warrant a 4-D classification and informed the registrant his case would be sent up to the appeal board following his physical examination"—wasn't that before the appeal board?

BY THE WITNESS:

That was.

BY THE COURT:

In view of that, do you say the board said, "We can't

[Tr. 78]

change your classification, it is out of our hands, you have taken an appeal?"

BY THE WITNESS:

Yes.

BY THE COURT:

You mean they did say that and they said this?

BY THE WITNESS:

That was dictated by the board chairman.

• • •

BY MR. HOOPES:

I have to object to this examination of the Government witness by the Court.

BY THE COURT:

I want to say, sir, that this is not a matter for the jury, it is a matter for the Court to decide whether or not there

has been a proper hearing by this board. Do you say that is a question of fact for the jury?

[Tr. 79]

BY MR. HOOPES:

I didn't say that. I am raising an objection so it may be on the record. I object. I object to cross-examining the Government's witness by the Court after she has testified in answer to my question.

BY THE COURT:

In answer to a leading question.

BY MR. HOOPES:

On cross-examination I have a right to ask leading questions.

BY THE COURT:

Yes, you have. It was a leading question. I want to know precisely what happened so that I can find out if your client got his rights before that board. If he didn't, it is my duty to so find, but I want the facts.

BY MR. HOOPES:

I want the facts. I want my objection on the record.

BY THE COURT:

You have your objection on the record, and you are perfectly right in taking it. You feel that way; take it.

* * *

[Tr. 89]

BY MR. HOOPES:

I think I must at this time renew my motion for a judgment of acquittal for the same reasons which I have already stated.

BY THE COURT:

That is right.

And now that your motion has been renewed, and applying the same test in this new situation, the motion is denied.

You may proceed with your closing if you desire to close.

Statement by Court

* * *

[Tr. 93]

BY THE COURT:

Now then, for the record, the case was started on Thursday. The young lady from the draft board was late arriving, and we waited then for her arrival. Mr. Kalp of the United States Attorney's Office, who had carried the laboring oar, was already assigned to appear before Judge Follmer at Harrisburg on Friday morning, and the Court had already committed itself to attend the One Hundreth Anniversary of the University of Pennsylvania Law Review in Philadelphia on Friday. So that put the hearing over from Thursday, the case not having been concluded, to Monday morning. There was a misunderstanding. Notwithstanding ten of the jurors appeared, there was a misunderstanding on the part of two of them, and they appeared at 2:00 o'clock, and we proceeded to try it from that time on. That accounts for any "dragging out" counsel might refer to.

As to the question of whether or not it is a question of law or fact, we will be glad to hear any argument counsel sees fit to make on the question.

As to what should go before the jury, as we understand

[Tr. 94]

it, the Court is obliged to pass upon whether or not the hearing as such shows any lack of due process, and we have a paper here which we propose to instruct the jury on—what I propose reading to the jury.

"From an examination of the Selective Service file and appeal board record of the registrant-defendant, the Court finds that there is evidence in the record to support the classification arrived at by the Selective Service authorities.

"The Court further finds from an examination of the Selective Service file and appeal board record that the classification of the registrant-defendant by the Selective Serv-

ice authorities was not illegal, arbitrary or capricious."

We will instruct the jury on that, and we will proceed on what we think is the theory of those cases.

There was a conflict apparently along the line. Some courts held that you had to have substantial evidence. Others say that all the Court had to do was to find that they had a hearing, and there was an in-between. Is there evidence? That seems to be the test. We are bound by it, at least, so the Supreme Court says.

And there is evidence here, the young lady says one thing, the files say another. The files are there, and they show the young man's—I mean the summary exhibits and the letter he offered and went on up on. If there is evidence there, as we understand it, upon which they passed as in Cox and Estep, we stop, unless we find that it is arbitrary, [Tr. 95]
capricious or illegal.

* * *

EXHIBITS

[Immaterial portions are omitted in printing. Handwritten or typewritten material is distinguished from the wording of the printed form by *italics*.]

SELECTIVE SERVICE SYSTEM
CLASSIFICATION QUESTIONNAIRE

JAN 31 1951
[Local Board Stamp]
Selective Service No. *36 28 30 71*
Date of mailing *JAN 23 1951*
Date of birth: (Month) *Feb.* (Day) *7* (Year) *1930*
Name: (Last) *Witmer* (First) *Philip* (Middle) *Andrew*
Address: (Number and street or R. F. D. route) *R. D. #1*

Classification Questionnaire

(City, town, or village) *Reinholds* (Zone) (County) *Berks* (State) *Pa.*
Local Board No. 28
Colonial Trust Building
447-449 Penn Street
Reading, Pa.
(Stamp of Local Board)

Notice to Registrant

• • •

This questionnaire must be returned on or before *FEB 2 1951*

Leonore Rhoda
Clerk of Local Board.

• • •

SSS Form No. 100

[Page 2]

• • •

Statements of the Registrant
Series I.—Identification

• • •

1. My name is (print) (Last) *Witmer* (First) *Philip* (Middle) *Andrew*

• • •

5. My Social Security number is *197-24-3873* . . .

Series II.—Present Members of Armed Forces

• • •

Does not apply.

• • •

[Page 3]

• • •

Series III.—Prior Military Service

• • •

Series IV.—Officials Deferred by Law

• • •

Series V.—Sole Surviving Son

Exhibits: Defendant's Selective Service File

* * *

Series VI.–Minister, or Student Preparing for the Ministry

* * *

Does not apply.

* * *

[Page 4]

Series VII.—Family Status and Dependents

* * *

Series VIII.—Present Occupation

1. Every registrant must check each of the following boxes appropriate to his case and follow the instructions indicated.

* * *

(b) I am now working in a nonagricultural occupation. *X*

* * *

2. The job I am now working at is . . . *Multiroller in a Hat Factory.*

3 I do the following kind of work in my present job . . . *Turn Hats by hand*

4. In my present job, I am . . . [left blank]; I have worked *3* years in my present trade, and I (do, do not) *do not* expect to continue indefinitely in it. . . .

[Note added in right margin:]
Works in Hat Factory

5. My employer is *Geo. W. Ballmay Inc. . . . Adamstown Pa. . . . whose business is Hat Manufacturer . . .*

6. (a) I was employed by present employer on (Date) *Jan. 26, 1948*

(b) I entered job described in Statements 2 and 3, this series, on (Date) *Jan. 26, 1948*

[Page 5]

(c) I am paid at the rate of *$0.92* per hour *X* . . .

(d) I work an average of *40* hours per week.

7. Other business or work in which I am now engaged is *operating farms* . . .

8. Prior work experience *have been working on farm*

since youth knew nothing of work in Hat Factory until Jan. 26, 1948

* * *

Series IX.—Agricultural Occupation

* * *

1. I work on or operate a farm, orchard, or ranch as . . .

(a) Sole owner-operator of the farm *X* . . .

(d) Cash tenant or renter *X* . . .

My agreement with (Name of landlord) *Ralph Kline* expires (Month) *Oct.* (Day) *1* (Year) *1951* (Name and address of employer) *Ralph Kline, R. #1 Reinholds, Pa.*

2. I have been engaged in farm work continuously since (Date) *Youth*

3. I (do, do not) *do* live on the farm where I work.

4. I (am, am not) *am* actually and personally responsible for the operation of the farm where I work.

5. The principal crops and livestock of the farm I operate or work on are:

Names of Crops	Acres Devoted to Each
1951	
wheat	*8*
oats	*4*
corn	*18*
Hay	*10*
Vegtables	*2*
Kinds of Livestock	**Number of Each Now on Farm**
Cows	*1*
Young Stock	*6*
Brood Sow	*1*
Feeder Pigs	*4*
Laying Hens	*25*

6. Total value of products sold from this farm during the last crop year *$1200.00*

7. Principal products marketed during the last two years *Beef & Pork*

8. The number of year-round workers on this farm is (Number) *1* of whom (Number) *none* are hired hands.

* * *

11. Other business or work in which I am now engaged (Nature of business; if none, write "None") *Multiroller in Hat Factory*

* * *

[Page 6]

Series X.—Education

1. I have completed *8* years of elementary school . . .

Series XI.—Students

* * *

Series XII.—Citizenship

* * *

Series XIII.—Court Record

* * *

[Page 7]

Series XIV.—Conscientious Objection to War

* * *

By reason of religious training and belief I am conscientiously opposed to participation in war in any form and for this reason hereby request that the local board furnish me a Special Form for Conscientious Objector (SSS Form No. 150) which I am to complete and return to the local board for its consideration.

(Signature) *Philip Andrew Witmer*

Series XV.—Physical Condition

* * *

Registrant's Statement Regarding Classification

* * *

Registrant's Certificate

* * *

I, *Philip Andrew Witmer*, certify that I am the registrant named and described in the foregoing statements in this questionnaire; that I have read (or have had read to me) the statements made by and about me, and that each and

every such statement is true and complete to the best of my knowledge, information, and belief. The statements made by me in the foregoing (are, are not) *are not* in my own handwriting.

(Signature or mark of registrant) *Philip Andrew Witmer*

• • •

[Page 8]

Dates	Minutes of Action by Local Board and Appeal Board	Vote Yes	Vote No
1-31-51	*Form 150 sent*		
2-21-51	*Classified 1-A. Form 110 sent 2-22-51*		
3-19-51	*Board met with registrant. No action taken (see note in file)*		
MAR 28 1951	*SSS Form 223 MAILED*		
4-11-51	*Form 62 sent. Accepted*		
4-24-51	*Forwarded to U. S. Atty., Eastern Dist. of Pa., in accordance with Section 1626.25. The Appeal Board reviewed the file and determined that the registrant should not be classified in either Class 1-A-O or Class IV-E under the circumstances set forth in subparagraphs (2) or (4) of paragraph (a) of this section.* *W. LeRoy McKinley*		
11-6-51	*File received from Appeal Board. Classified 1-A by 4 to 0 vote. Form 110 sent registrant.*		
11-21-51	*SSS Form 252 sent*		
12-10-51	*Induction Station advised today registrant refused Induction into Armed Services. Reported to U. S. D. A. on Form 301*		

Exhibits: Defendant's Selective Service File

#1 Reinholds, Pa.
January 30, 1951

Local Board #28
Colonial Trust Building
Fifth & Penn Streets
Reading, Pennsylvania
Gentlemen:

[Note inserted in margin:]
Works in Hat Factory

Re: Selective Service #30-71

Attached hereto you will find selective service questionnaire. Please note that in addition to being employed as a multiroller in a hat factory owned and operated by George W. Bollman, Inc., Adamstown, Pennsylvania I also operate my father's farm (Myers Witmer) consisting of 116 acres, 30 of which is under cultivation at this time. In 1951 the following was under cultivation:

Corn	4	Acres
Oats	3	"
Soy Beans	2	"

At the present time I have the following livestock:

JAN 31 1951
[Local Board Stamp]

Milk Cows	1
Heifers	2
Calfs	4
Brood Sows	1
Feeder Pigs	4
Laying Hens	25

It is my ambition to increase the cultivated land on this farm and have rented an additional 25 acres from a neighbor, 8 acres of this I have seeded to wheat for 1951 harvest. I intend to put more land into cultivation in 1951 and also increase the livestock. This work I am doing during hours that I am not employed at the hat factory. The reason I

am employed in a hat factory is to accumulate some money to buy some additional machinery and livestock. I own a tractor which I purchased three years ago, and in addition to using it on my own land I also do custom work for neighbors. It is my ambition to become a farmer and devote all my time to farming. For this reason I am appealing to you to grant me an agricultural classification as I assure you that I will increase production year after year, and contribute a satisfactory amount for the war effort and civilian use.

Yours truly,
Philip Andrew Witmer
Philip Andrew Witmer

SELECTIVE SERVICE SYSTEM
SPECIAL FORM FOR CONSCIENTIOUS OBJECTOR

Selective Service No. *36 28 30 71*
Name: (Last) *Witmer* (First) *Philip* (Middle) *Andrew*
Address . . . *R.D. #1. . . . Reinholds . . . Penna.*
[Local Board Stamp]

This form must be returned on or before *February 5, 1951*

• • •

Series I.—Claim for Exemption

• • •

FEB 5 1951
[Local Board Stamp]
[Statements A and B left blank]

Series II.--Religious Training and Beliefs

• • •

1. Do you believe in a Supreme Being? Yes *X*

2. Describe the nature of your belief which is the basis of your claim made in Series I above, and state whether or not your belief in a supreme being involves duties which to you are superior to those arising from any human relation.

I am absolutely netral toward the political disputes and the international conorversies and combats of this world. I take no active or violent part for either side, but pay my vows to God and always advocate his kingdom and way of salvation.

[Page 2]

3. Explain how, when, and from whom or from what source you received the training and acquired the belief which is the basis of your claim made in Series I above.

In my youth I was instructed by my parents in the study of the Bible. In the year 1942 I myself began to study the Bible with aid of the Watchtower.

4. Give the name and present address of the individual upon whom you rely most for religious guidance.

Richard Palms 128 Robeson St. Reading

5. Under what circumstances, if any, do you believe in the use of force?

I believe in the use of force only at the command of Almighty God.

6. Describe the actions and behavior in your life which in your opinion most conspicuously demonstrate the consistency and depth of your religious convictions.

By reason of the study of the Bible I have tried to tell others about God's Kingdom, and of how he will put a stop to all wars.

7. Have you ever given public expression, written or oral, to the views herein expressed as the basis for your claim made in Series I above? If so, specify when and where.

No.

Series III.—General Background

* * *

1. Give the name and address of each school and college which you have attended, together with the dates of your attendance; and state in each instance the type of school (church, military, commercial, etc.).

Special Form for Conscientious Objector

Name of School	Type of School	Location of School	Dates Attended From–	To–
Trostle	*Grade*	*Brecknock Township*	1938	1946

* * *

2. Give a chronological list of all occupations, positions, jobs, or types of work, other than as a student in school or college, in which you have at any time been engaged, whether for monetary compensation or not, giving the facts indicated below with regard to each position or job held, or type of work in which engaged.

Type of Work	Name of Employer	Address of Employer	Period Worked From–	To–
Make hats	*George W. Ballman*	*Adamstown, Pa.*	1948	1951
Part time farming	*Self*		1948	1951
Witnessing from door to door			1948	1951

3. Give all addresses and dates of residence where you have formerly lived.

* * *

None

4. Give the name and address of your parents and indicate whether they are living or not.

Myers G. Witmer Reinholds R. F. D. #1 living
Clara Witmer Reinholds R. F. D. #1 living

5. (a) State the religious denomination or sect of your father *Jehovah's Witnesses*

(b) State the religious denomination or sect of your mother *Jehovah's Witnesses*

Series IV.—Participation in Organizations

1. Have you ever been a member of any military organization or establishment? If so, state the name and address of same and give reasons why you became a member.

No.

2. Are you a member of a religious sect or organiza-

tion? (Yes or no) *Yes* . . .

(a) State the name of the sect, and the name and location of its governing body or head if known to you.

Jehovah's Witnesses, Watchtower Bible and Tract Society, Inc. Brooklyn, N. Y.

(b) When, where, and how, did you become a member of said sect or organization?

I was always in this belief

(c) State the name and location of the church, congregation, or meeting where you customarily attend.

Kingdom Hall, 12 N. 4th St. Reading Pa.

(d) Give the name, title, and present address of the pastor or leader of such church, congregation, or meeting.

Richard Palms 128 Robeson St. Reading Pa.

(e) Describe carefully the creed or official statements of said religious sect or organization in relation to participation in war.

Find enclosed the Feb. 1 Watchtower for the answer to this question

3. Describe your relationships with and activities in all organizations with which you are or have been affiliated, other than military, political, or labor organizations.

I am one of Jehovah's Witnesses

[Page 4]

Series V.—References

Give here the names and other information indicated concerning persons who could supply information as to the sincerity of your professed convictions against participation in war.

Name	Full address	Occupation or Position	Relationship to You
Richard Palms	*128 Robeson Reading*	*minister*	*none*
Earl Adams	*1602 Crowder Ave. Reading*	"	"
Elmer Palm	*217 Hudson Reading*	"	"
John S. Johnston	*Mohnton, R. D. #2*	"	"

Special Form for Conscientious Objector

Registrant's Certificate

* * *

I, *Philip Andrew Witmer,* certify that I am the registrant named and described in the foregoing statements in this questionnaire; that I have read (or have had read to me) the statements made by and about me, and that each and every such statement is true and complete to the best of my knowledge, information, and belief. The statements made by me in the foregoing (are, are not) *are* in my own handwriting.

(Signature or mark of registrant) *Philip Andrew Witmer*

* * *

My training and belief in relation to a Supreme Being involves duties superior to those arising from any human relation. This prevents me from turning aside from those superior duties which I owe to a superior Being.

Philip A. Witmer

for section 1 (B)
Page 1

[Marked Government's Exhibit "A"]

Answered 3-15-51 for appearance at 2 P. M. on 3-19-51.
LCR, Clerk

Philip A. Witmer
c #36-28-30-71
Reinholds, Pa. R #1
March 1, 1951

Local Board #28
Colonial Trust Building
447-449 Penn St.
Reading, Pa.
Local Board #28
Sirs:

On the *strenght* of my right to appeal my service classi-

fication I wish to state that I am a minister of the gospel.

On the *strenght* of this fact I wish to appeal this *classifation* and request a personal appearance to present evidence to this fact.

Respectfully
Philip A. Witmer

MAR 5 1951
[Local Board Stamp]

MAR 19 1951
[Local Board Stamp]

Reading, Pa.
March 17, 1951

To Whom It May Concern:

This is to certify that Philip Witmer of R. D. #1, Rheinholds, Pa. is personally known to me as being a student of the Bible who *relys* upon the publications of the Watchtower Bible & Tract Society of Brooklyn, N. Y. for guidance in the study of the Scriptures as these apply to the fulfillment of the prophecies of God's word.

Mr. Witmer has been guided and encouraged in the study of the Bible by his parents since he was able to understand and appreciate the very important information contained in the scriptures inspired of Jehovah God.

Since the year 1942 Mr. Witmer has on many occasions engaged in the preaching of the good news or gospel to others which proclamation was commanded by Christ Jesus and which preaching activity is mandatory upon those whose lives are devoted to the doing of Jehovah God's will. Reports of Mr. Witmer's ministry activity have been received by me and a record *kepts* so that documentary evidence of his preaching is available.

Richard B. Palms
City Servant, Reading Pa.
Company of Jehovah's Witnesses

Affidavit of Richard B. Palms, March 17, 1951

Sworn to and subscribed before me
this 17th day of March 1951
P. G. Schmidt
P. O. Box 1413
Reading, Pa.
Notary Public
My Commission Expires 2-21-53

Statement

I, Philip Andrew Witmer, Selective Service No. 36-28-30-71 was born at Reinholds, R. F. D. #1, Berks County, Brecknick Township, Pennsylvania on February 7, 1930. From the beginning my parents taught me about the Bible with the help of the Watchtower publications. For many years I attended Bible study classes twice weekly. In 1942 I began to carry Bibles and Bible study aids from door to door because I wanted the men and women I contacted to know of the hope which is set forth in God's word.

The primary ordination of Jehovah's Witnesses comes from Almighty God. Each of such witnesses relies on the identical Bible authority that Jesus Christ cited. Jesus quoted from Isaiah 61:1, 2 as follows: "The spirit of the Lord is upon me, because he hath anointed me to preach the gospel to the poor, he has sent me to heal the broken hearted, to preach deliverance to the captives, and recovering the sight to the blind, to set at liberty them that are bruised, to preach the acceptable year of the Lord, and comfort all that mourn." Luke 4:17-19

Jehovah's Witnesses speak of their ordination as did Jesus' apostles. Apostle Paul said, "I am ordained a preacher, and an apostle." Ordination to preach does not depend upon the age of the individual, except that the individual must have reached the age of discretion. One must be able to understand, to know intelligently, and make an agreement to do the will of Almighty God. Timothy was quite

young and not yet of "full age" or of mature years when he was ordained to preach and teach. (See I Timothy 4:11-13)

To be ordained does not require one to attend a seminary or parochial or divinity school. Jesus did not attend such a school. He was taught by his parents at home, and afterward studied the scriptures. Attending the Watchtower Bible-study meetings is sufficient training to enable one to do the will of God as his minister.

Although I, as one of Jehovah's Witnesses, will not attend such ecclesiastical schools set up by religious organizations, I have received a much higher training and schooling in the word of God by attending places of study to qualify for my ordination. Jesus' apostles were well educated in the Aramaic language of their day, the laws of the land, and especially in the word of God. They studied the scriptures of Christ Jesus. Just so today, Jehovah's Witnesses are very familiar with the word of Almighty God as it appears in the Bible, and they, too, instruct persons of good will.

I have been farming for the last three years and also worked at the Bollman Hat Factory to accumulate funds to do more farming. I am now a farmer and raise livestock and grow grain from the fifty odd acres that I am cultivating. I engage in this secular work to keep me going in my ministry work. I'd appreciate it if you would take the statement of secretary Charles Brennen (Agriculture Department) which was: Quote: "Farmers should tell their local draft boards to exempt their farm helpers." How can this be done if the farm managers and operators are not exempt? Who is to harvest the grain planted last November? Who is going to plant and harvest the corn and make the hay if I'm not here to do and direct this work?

I go from house to house just as Jesus and the apostles did. See Acts 20:20 and Mark 6:6. When I go preaching I present literature to the people which they can use in conjunction with their Bibles. If the person is interested and

if permitted I then establish a Bible study in their home. These studies are conducted by using the Bible explanations and questions as provided by the Watchtower Bible and Tract Society. If the person continues to show interest I invite them or bring them to the Company meetings in harmony with the scriptures at Hebrews 10:25, "Forget not the assembling of yourselves together and exhorting one another and so much the more as you see the day approaching."

Jehovah's Witnesses participate in proclaiming the Gospel of God's Kingdom. The above work, together with participating in company meetings are essential requirements that must be met before one will be recognized as a minister by the Watchtower Society. Preaching at funerals and performing marriage ceremonies are not essential requirements for being recognized as a duly ordained minister by the Watchtower Society, because in the tenth chapter of Matthew, relates the instruction given by Jesus to his disciples as to their course of action when preaching, and it said nothing about performing funeral or marriage ceremonies. Not at any time do the scriptures mention that a member of the clergy officiate at either of these ceremonies.

Preaching the Gospel is of great importance because the apostle Paul stated at I Cor. 9:16, "Woe is me if I preach not the Gospel." Jesus said, "Go ye into the world and preach the Gospel to every creature." I must preach and teach as did my Lord and master Christ Jesus and also the apostles. This they did by going from house to house (Acts 20:20) and gathering the interested ones together. They did not build temples and ask the people to come there and worship, because it states at Acts 17:24, 25, "God dwelleth not in temples made by hands." The Bible shows what is 'pure worship' at James 1:27: "For the worship that is pure and holy before God the Father, is this: to visit the fatherless and the widows in their afflictions, and that one keep himself unspotted from the world." I am a Christian and

therefore my weapons are not carnal. II Corinthians 3:5 states, "For though we walk in the flesh, we do not war after the flesh, for the weapons of our warfare are not carnal, but mighty through God to the pulling down of strongholds, casting down imaginations, and every high thing that exalteth itself against the knowledge of God, and bringing into captivity every thought to the obedience of Christ." I am proclaiming the message concerning the righteous Kingdom which Jesus taught his followers to pray for as the only hope for mankind. I therefore could not take part in the conflict between the nations.

The work that I now do is of greatest universal importance therefore I could not take part in a conflict of national or even international importance. If I would take part in such conflict I would not be keeping unspotted from the world, and I would therefore be breaking my covenant that I made with Almighty God. Romans 1:31, 32 says, "Covenantbreakers are worthy of death." A Christian learns from the prophecies now being fulfilled that he must give all his effort to bring the Gospel message to people who are thirsting for the truth.

We are living in the time of the great trouble as related in the 24th chapter of Matthew. All statements relative to the 24th chapter of Matthew are in the process of fulfillment for the first time since 1914. (Matthew 24:14). "And this Gospel of the kingdom shall be preached in all the world for a witness unto all nations, then the accomplished end will come."

In view of the facts set forth in this statement, and all other information which I hereby submit as a part of my record, show that I should be classified in 4D. I therefore ask you, as members of Local Board #28, before you make a decision as to whether or not I am a duly ordained minister you should take into consideration my assigned duties and in what manner I am regarded by other Jehovah's Witnesses. I also ask you as Board officials not to be influenced by

your personal feelings regarding the doctrines taught by Jehovah's Witnesses or your personal likes or dislikes of any individual of the organization. I would like you to examine the information above submitted carefully, and not make a decision by using your personal ideas as to what you feel constitutes an ordained minister.

In the United States of America the Selective Service Act of 1948 which controls the decision of draft boards and public officials provides for the deferment of conscientious objectors and also for the exemption of those under vows to God. Section 6(j) provides for the deferment of "any" person "Whose training and belief in a relation to a supreme Being involving duties superior to those arising from any human relation" prevent such person from turning aside from those superior duties which he owes to the Supreme Being.

If there is any further information which you desire, you can call upon me or communicate with the Watchtower Society.

Respectfully submitted,
Philip Andrew Witmer
Philip Andrew Witmer

March 19, 1951

Re: Order #36-28-30-71
Philip Andrew Witmer

The Board met with registrant today. The registrant informed the Board that he left his place of employment on March 3, where he had worked for three years in a hat factory. The Board chairman immediately pointed out that he was classified as 1-A on February 21, which meant he left his position about two weeks later. He then mentioned that his father had a farm which had not been worked as a farm for 23 years but that he felt he was going to start getting

this farm in shape. Prior to this time he stated he had gotten a few acres in shape for their own family use so that they would not be dependent upon other people.

The registrant then pointed out that he was a minister of the Gospel and the only evidence he presented to substantiate this fact was some paraphernalia from the Watchtower Association of the Jehovah Witness. The registrant was asked if he was an ordained minister and he said Jehovah Witnesses became ordained when they started distributing their literature. The Board felt this was not sufficient evidence to warrant a 4-D Classification and informed the registrant his case would be sent up to the Appeal Board following his physical examination.

APPEAL BOARD
STATE OF PENNSYLVANIA

Northwest Office Bldg., PO Box 92
Harrisburg, Pa.

(Appeal Board Stamp)

APR 25 1951
[Local Board Stamp]

Date: 24 April 1951

United States Attorney
Eastern District of Pennsylvania
Fourth Floor, U. S. Court House
Ninth and Market Streets
Philadelphia 7, Pennsylvania

Re: WITMER, Philip Andrew
SS No. 36-28-30-71

Dear Sir:

The file of the above registrant has been reviewed by members of the Appeal Board and they are of the opinion

that he is not entitled to a class lower than Class 4-E or to Class 4-E. Therefore, the cover sheet and file of the above registrant is transmitted herewith to the Department of Justice in accordance with Section 1626.26(a) (4) of the Regulations for the purpose of securing an advisory recommendation.

For the Appeal Board:
(Mrs.) Mary L. Cohen
Clerk

cc to Local Board No. 28
SSSP-550

DEPARTMENT OF JUSTICE
OFFICE OF THE DEPUTY ATTORNEY GENERAL

Washington
October 18, 1951

Chairman, Appeal Board for the
State of Pennsylvania
Selective Service System
Northwest Office Building
Harrisburg, Pennsylvania

Re: Philip A. Witmer
Selective Service No.
36-28-30-71
Local Board No. 28
Reading, Pennsylvania

Dear Sir:

As required by Section 6(j) of the Universal Military Training and Service Act, an inquiry was made in the above-captioned case and an opportunity to be heard on his claim for exemption as a conscientious objector was given to the registrant by Honorable Shippen Lewis, Hearing Officer for the Eastern District of Pennsylvania.

After consideration of the character and good faith of the objections of the registrant, the Department of Justice recommends to your Board that his claim for exemption from combatant and noncombatant training and service be not sustained.

You will note that this Department does not concur in the recommendation of the Hearing Officer. January 30, 1951, while employed in a hat factory, registrant wrote a letter to the local board, in which he states: "It is my ambition to become a farmer and devote all my time to farming. For this reason I am appealing to you to grant me an agricultural classification as I assure you that I will increase production year after year, and contribute a satisfactory amount for the war effort and civilian use." In his letter to the local board dated March 1, 1951, registrant claims to be a minister of the Gospel. Registrant's inconsistent statements and his offer to contribute to the war effort are believed to be incompatible with a sincere conscientious objector claim.

It is also noted that registrant did not sign series I (A) or (B) on SSS Form No. 150.

The Selective Service Cover Sheet in the case is returned herewith.

Sincerely,
A. Devitt Vanech
A. Devitt Vanech
Deputy Attorney General

PHILIP A. WITMER
(36-28-30-71)

FBI REPORT

The registrant is one of Jehovah's Witnesses. He and his father are very active in the group.

EDUCATION: A teacher in the grade school which the registrant once attended, who had him for eight grades, speaks highly of his character, knows that the family are Jehovah's Witnesses and thinks that the registrant is a sincere objector.

CHURCH: A number of other Jehovah's Witnesses say that the registrant and his father are very active in the group. Those who profess to know about his position as to conscientious objection believe him to be sincere.

WORK: The foreman at the factory where the registrant worked for about three years until recently thinks he is "very religious and very sincere in his beliefs." A fellow employee at this factory knows the registrant and his father and says that the registrant has been "very aggressive" in talking religion to his fellow workers, and that he has heard him say not long ago that it is wrong for Christians to go to war.

NEIGHBORS: The neighbors who have given information agree as to the high character of the registrant and his family and as to their activity as Jehovah's Witnesses, and those who express an opinion as to the registrant's pacifism think that he is sincere in his stand.

STATEMENT OF FACTS

The registrant is one of Jehovah's Witnesses, to which group his father has belonged since before his birth.

The registrant signed Series XIV in Form 100 but did not in Registrant's Statement Regarding Classification suggest his proper classification. With Form 100 he sent the Local Board a letter of 1-30-51 asking for "an agricultural classification", promising to "contribute a satisfactory amount for the war effort and civilian use."

In Form 150 the registrant takes the position which all Jehovah's Witnesses take,—that he is "neutral" in all con-

troversies between worldly government, that his obligations to God are superior to any other obligations and that consequently he will not take part in war. This position is a form of pacifism peculiar to this group. They say that they would fight at the Lord's command, but that there is now no such command to them. They say that the ancient Jews were justified in making war because Jehovah commanded them to. They claim to be ministers of the gospel and object to army service because it will interfere with their ministry. They usually refer also to the Christian obligation to love others and not to hate or harm them. The registrant says on this point: "We believe in love and you are supposed to love everybody even your enemies." This registrant's pacifism is based on all these considerations. His position is the same as that of many members of this group whom I heard during the war and who were classified 4E.

As to taking noncombatant service, he quotes his old school teacher who used to say, the boy who makes the snow balls is just as responsible as the boy who throws them.

The only witness was Forrest R. Baer, a full-fashioned knitter, who has belonged to the Reading Company of Jehovah's Witnesses since 1935. He has known the registrant for about five years and vouches for him as a sincere and active member of the group. During the war, Mr. Baer was classified as a minister. He refused to go to a C. P. S. Camp and consequently, spent thirty-nine months in Lewisburg Prison, which seems to me to show the strength of his convictions.

The registrant is evidently a life-long and rather active Jehovah's Witness. His desire to be deferred on other grounds does not seem to me to invalidate his claim to be regarded as a conscientious objector. It is not unnatural to prefer a deferment easier to obtain.

Record of Classification by Appeal Board in I-A

RECOMMENDATION

I recommend that the registrant be classified IV-E.

Shippen Lewis
Shippen Lewis
Hearing Officer

SELECTIVE SERVICE SYSTEM
INDIVIDUAL APPEAL RECORD

[Local Board Stamp]
APR 13 1951

Name of registrant (Last) *Witmer* (First) *Philip* (Middle) *Andrew* Selective Service Number *36 28 30 71*
Classified by local board in Class *I-A* . . .

X Forwarded on appeal taken by Registrant
Date forwarded to appeal Board *April 13, 1951* . . .

Leonore C. Rhoda
Clerk of Local Board

Minutes of Action by Appeal Board

[Local Board Stamp]
NOV 6 1951

• • •

Appeal Board State of Pennsylvania Northwest Office Bldg., PO Box 92 Harrisburg, Pa.
Classified in Class *I-A* until . . . by the following vote:

Yes *4* No *0* (Date of classification by Appeal Board)
NOV 2 - 1951

[Signature]
Member or Clerk of Appeal Board

• • •

SSS Form No. 120

Reinholds, Pa.
Nov. 15, 1951

Local Board 28
Balis Building
6th & Court St.
Reading, Pa.
Gentlemen:

Please find enclosed two letters. I wish to have them placed in my file.

One is a copy of a letter sent to General Hershey and the other one to the President of the appeal board.

The second one is a statement of my baptism.

In view of the letters sent to the President of the board of appeals, I ask that you defer the issuance of induction order until the Director and the General have acted upon the reconsideration of my classification.

Respectfully submitted
Philip A. Witmer 36-28-30-71
Philip A. Witmer
NOV 16 1951
[Local Board Stamp]

R. F. D. #1
Reinholds, Pa.
November 16, 1951

NOV 16 1951
[Local Board Stamp]
Gentlemen:

I would appreciate your careful consideration of this letter as it is of the utmost importance.

On November 7, I Philip A. Witmer, 36-28-30-71 received another 1A classification by a vote of 4 to 0, and feel

that there must be a serious mistake somewhere, and ask that you carefully consider the facts at hand.

On January 25 I received my Selective Service Questionnaire from my local draft board (28), and stated the facts as good as possible also requesting the questionnaire for conscientious objectors.

I was classified 1A, February 22, after which I requested to have a hearing at the local board, and was granted this request. I appeared and answered the questions that were asked of me.

On March 28, 1951, I got a letter informing me that I would have to take a physical examination before they would consider my appeal. On April 4 I took my physical examination at New Cumberland, Pa. It was April 11, 1951, when Board 28 mailed me the letter informing me that I was found acceptable for induction into the armed services.

I did not hear anything until I received a letter informing me that there was to be a hearing for me with Shippen Lewis in Philadelphia, Pennsylvania. Mr. Lewis asked me a few questions but did not have much to say. Later Mr. Lewis notified me concerning the vote of the appeal board made on his recommendation that I should be classified in 1A. This letter is written in request for a 4D minister's classification.

I am now and always have been one of Jehovah's Witnesses ever since I've had an understanding of what it means to believe in a supreme being. At about 14 years of age I felt that it was my duty to tell others of the things I have learned about God's purposes. In order to more effici ntly preach "this Gospel of the Kingdom" I am continuing my study of the Bible with the help of the Watchtower Bible Study Aids. Briefly I will explain why I cannot enter the armed forces.

At Acts 20:20 we read, "While I did not hold back from telling you any of the things that were profitable nor from teaching you publicly and from house to house." (New

World Translation). Preaching the gospel is of great importance because the apostle Paul said at I Corinthians 9:16, "Woe to me if I did not declare the good news." Jesus said, "Go ye into the world and preach the gospel to every creature." I too must preach and teach as my lord and Master did. Let us also read what the Bible states at James 1:27. "For the worship that is pure and holy before God the Father is this: to visit the fatherless and the widows in their afflictions, and that one keep himself unspotted from the world."

Those are just a few of the reasons why I could not take part in carnal warfare. It would mean I'd have to stop doing door to door work which is preaching this gospel of the Kingdom, and would mean that I am not unspotted from this world, but would be a part of it ready for destruction. This is just a small part of the statement which I sent along with my questionnaire which gave a detailed explanation of the work I am doing.

This one thing I wish to bring to your attention. On Sunday September 23, 1951, I was baptized in water in the same manner as Jesus Christ was baptized. Being baptized is an outward expression of showing your faith in the Lord, and a promise to do his will by preaching the word. Conditions in the world at the present time are well described in the 24th chapter of Matthew.

I hope this letter will help you understand why I cannot accept a 1A, but ask for a 4D minister's classification in all honesty and truth.

If there are any recommendations on your part please pass them on to Local Board 28, Balis Building, 6th & Court Streets, Reading, Pa.

Respectfully submitted,

Philip A. Witmer
Philip A. Witmer

Letter of Appeal Board to Defendant, Nov. 20, 1951

I Philip A. Witmer 36-28-30-71 wish to state that I was baptized in water according to the way the Bible has set forth.

Being baptized is a *grate* step for a Christian to take. It means that he has set himself apart from the world and it's affairs and has consecrated himself to serving the Lord.

NOV 16 1951
[Local Board Stamp]

NOV 21 1951
[Local Board Stamp]

20 November 1951

Mr. Philip A. Witmer
R. F. D. #1
Reinholds, Pennsylvania

Dear Sir:

This will acknowledge receipt of your letter of 16 November 1951, which I am returning herewith inasmuch as the Appeal Board acts only upon information submitted through the Local Boards.

Your case was considered by the Appeal Board at its meeting held 2 November 1951, at which time all information contained in your file (including a recommendation from the Department of Justice that your claim for exemption from combatant and non-combatant service be not sustained) was carefully reviewed and considered by the Appeal Board, and their decision to retain you in Class 1-A was made by a vote of 4 to 0.

I would suggest you direct any future correspondence

to the Local Board with whom you are registered—No. 28.

For the Appeal Board

(Mrs.) Mary L. Cohen
Clerk

encl.
cc to Local Board No. 28
No. 36-28-30-71

[Government's Exhibit No. 1]

SELECTIVE SERVICE SYSTEM
ORDER TO REPORT FOR INDUCTION

NOV 21 1951
[Local Board Stamp]

(Date of mailing) *Nov. 21, 1951*

The President of the United States,

To (First name) *Philip* (Middle name) *A.* (Last name) *Witmer* (Selective Service Number) *36 28 30 71* (Street and number) *R. D. #1* (City) *Reinholds* (State) *Penna.*

Greeting:

Having submitted yourself to a Local Board composed of your neighbors for the purpose of determining your availability for service in the armed forces of the United States, you are hereby ordered to report to the Local Board named above at (Place of reporting) *7th & Franklin St. Station, inside, near telephone booths, Reading, Penna.* at (Hour of reporting) at *6:00 A.*m., on the *fifth* day of *December*, 1951, for forwarding to an induction station.

* * *

Member of Local Board.

SSS Form No. 252

Defendant's Letter to Local Board, Nov. 28, 1951

NOV 28 1951
[Local Board Stamp]

Reinholds, Pa.
Nov. 28, 1951

Local Board No. 28,
Balis Building
6th & Court St.
Reading, Pa.
Sirs:

I received my induction orders for Dec. 5th 1951.

In view of this I ask that you give me an extension of at least 30 days or more if at all possible, that I might finish husking corn and make arrangements to sell or make other provisions for the livestock and feed.

The reasons for this request are that I thought that you would give me a suitable classification. (4 D) And since I am self employed I could not stop and just wait until I found out whether I was to be called or not, so I went ahead. I must do something to make a living the same as any body else, and since I like to be around animals and do farm work etc. I started to farm my father's farm, and for no other reasons.

The stock which I have consists of the following: 2 milk cows, 3 bulls, 2 *heffers,* all less than one year old, 3 brood sows, 2 of which will *forrow* between now and Christmas. One of them had a litter of 6 on Sunday Nov. 25, 1951, also 3 shoats. Total 12 hogs. Also 310 chickens. About 1200 bales of hay and 300 bales of straw. The corn from about 20 acres (I sold some) and some fodder.

My father will not do anything like husk corn or tend stock, because he has a steady job and has no time for this.

I hope you understand the situation I am in. You don't have to take my word for the things I have told you, come and see for yourself if you wish.

I also do not deny the fact that I am a minister for Al-

mighty God, and will continue to *persue* this course until I am rightfully recognized as such.

Yours truly
Philip A. Witmer
36-28-30-71

November 28, 1951

Mr. Philip A. Witmer
R. D. #1
Reinholds, Pennsylvania

Re: Order #36-28-30-71

Dear Mr. Witmer:

After contacting Board members this morning with reference to your letter of today, I regret to advise they are unable to postpone your induction for thirty days for the reasons outlined in your letter.

Very truly yours,
(Mrs.) Leonore R. Moyer, Clerk
DEC 6 1951

[Local Board Stamp]
g:34:12-4

4 December 1951

The Director
National Headquarters
Selective Service System
1712 G Street Northwest
Washington 25, D. C.

Re: Philip A. Witmer
36-28-30-71

Attention: Col. Lewis F. Kosch

Dear Sir:

This will acknowledge receipt of your letter of 27 November 1951 relative to the above registrant.

Letter of State Director to National Director

We have reviewed the file and find that in the questionnaire which was returned to your Local Board on January 31, 1951, the registrant was employed by a hat manufacturer in Adamstown, Penna., and in addition, operated his father's farm. He indicated in series 14 that he was conscientiously opposed to war, and in section 6 of the questionnaire, he had overwritten the words "does not apply". He did not indicate what classification he should be granted in the applicable portion of the questionnaire. Upon receipt of the completed Form 150, he was classified in Class I-A by the Local Board on February 21, 1951, and on April 13, 1951, the file was forwarded to the Appeal Board, who in turn reviewed it and referred it to the United States Attorney. The Hearing Officer recommended that the registrant be classified in Class IV-E. However, the United States Attorney in a letter signed by the Deputy Attorney General, Washington, D. C., recommended that the report of the Hearing Officer be not credited, and that claim for exemption from combatant and non-combatant training and service be not sustained. The reasons for the action of the Department of Justice are the registrant's inconsistent statements and his offer to contribute to the war effort by

* * *

offering to increase the productivity of his father's farm. The Appeal Board retained the registrant in Class I-A by a unanimous decision on November 2, 1951. The registrant has been ordered to report for induction on December 5, 1951.

From review of the file, we are not convinced of the validity of the claims of this registrant to be either a conscientious objector or a minister of religion, and we can see no

reason to take any action in this matter. We are permitting the induction of the registrant to proceed as ordered.

For the State Director:

HENRY R. SHERRARD
Major, INF
Asst. Chief, Manpower Division

Copy: Local Board No. 28

DEC 6 1951
[Local Board Stamp]

[Government's Exhibit No. 2]

Dec. 5, 1951

I refuse to be inducted into the Armed Services of the United States.

[Signed] Philip A. Witmer

WITNESS:

1. s/ Vincent J. Fenerty
   Capt USAF
   Enlistment & Induction Officer
2. s/ Thomas W. Stone
   1st Lt Armor
   Enl & Ind Officer

A TRUE COPY
Vincent J. Fenerty
VINCENT J. FENERTY, Capt USAF

Notice of Refusal to Submit to Induction

DEC 10 1951
[Local Board Stamp]

VJF/kwg
6 Dec 51

SUBJECT: Refusal to Submit to Induction in the Armed Forces of the United States of America

To: Mr. Arthur A. Maguire
United States Attorney
Middle District of Pennsylvania
Scranton, 1, Pa.

1. On 5 December 1951, Philip Andrew Witmer, of R. D. #1, Reinholds, Penna. was ordered to this Induction Station by Local Board #28, Balis Building, Sixth & Court Streets, Reading, Pennsylvania for entry into the Armed Forces of the United States of America.

2. At the induction ceremony Philip Andrew Witmer refused to be inducted into the Armed Forces on two *occassions*. He was removed from the body of men being inducted and brought to my office where he again refused to be inducted. Philip Andrew Witmer stated that he was a member of Jehovahs Witnesses and the dictates of his conscience and religion would not permit him to enter into military service, even in a non-combat status. Of his own volition he signed the enclosed statement which you will note was witnessed by myself and 1st Lt. Thomas W. Stone, Armor.

3. Witness to this incident were:

a. Capt. Vincent J. Fenerty, USAF
USA & USAF Recruiting Main Station
216 Locust St.
Harrisburg, Pa.

b. 1st Lt Thomas W. Stone, Armor
USA & USAF Recruiting Main Station
216 Locust St.
Harrisburg, Pa.

Exhibits: Defendant's Selective Service File

4. Upon Philip Andrew Witmer's refusal to accept induction he was told to return to his home.

FOR THE COMMANDING OFFICER:

Vincent J. Fenerty
VINCENT J. FENERTY
Capt USAF
Enl & Ind Officer

1 Incl
Statement

January 22, 1952

Registrant called at Board Office this date and asked to see his file. File was given registrant, who noted information from file.

MOTION FOR JUDGMENT OF ACQUITTAL

The Defendant moves the Court to enter Judgment of Acquittal for the following reasons:

1. The induction order with the violation of which Defendant is charged is invalid because:

(a) The local board failed to consider the new information which it received at the time of Defendant's personal appearance, as required by Selective Service Regulation Section 1624.2(c).

(b) The local board failed to again classify the Defendant in the same manner as if he had never before been classified, as required by Selective Service Regulation section 1624.2(c).

(c) The local board failed, as soon as practicable after it again classified the Defendant, to mail notice thereof on Notice of Classification (SSS Form No. 110) to the Defendant, as required by Selective Service Regulation section 1624.2(d).

Darlington Hoopes
Attorney for Defendant

MOTION TO AMEND MOTION FOR JUDGMENT OF ACQUITTAL

And Now, January 15, 1953, the defendant by his Attorney, Darlington Hoopes, moves to amend his motion for Judgment of acquittal by adding sub-paragraph (d) so that the same will read as follows:

1. The induction order with the violation of which Defendant is charged is invalid because:

(a) The local board failed to consider the new information which it received at the time of Defendant's personal appearance, as required by Selective Service Regulation section 1624.2(c).

(b) The local board failed to again classify the Defendant in the same manner as if he had never before been classified, as required by Selective Service Regulation section 1624.2(c).

(c) The local board failed, as soon as practicable after it again classified the Defendant, to mail notice thereof on Notice of Classification (SSS Form No. 110) to the Defendant as required by Selective Service Regulation section 1624.2(d).

(d) The action of the local board and the appeal board in denying Defendant's claim for classification as a consci-

entious objector had no basis in fact and was therefore arbitrary and capricious.

Darlington Hoopes
Attorney for Defendant

OPINION

Defendant, found guilty by a jury of willfully refusing to submit to induction into the armed forces of the United States,[1] moves for judgment of acquittal. The record consists of the Selective Service file,[2] testimony of the clerk of the local board and of an army officer; the latter as to the refusal to be inducted. Defendant did not testify or offer any independent testimony on his behalf.

A valid order to report for includes the duty to submit to induction. See *Billings* v. *Truesdell,* 321 U. S. 542 at 557, 64 S. Ct. 737, 88 L. Ed. 917. While not disputing the refusal to be inducted defendant contends that the induction order was invalid and unenforcible. He claims he was not classified in conformity with the Act and regulations adopted pursuant thereto, that he was not afforded procedural due process, and that the local and appeal boards, without basis in fact and in an arbitrary and capricious manner, denied him the classification to which he was entitled.

In answering his classification questionnaire defendant advised that he had been working in a hat factory for three years at $.92 per hour 40 hours a week; that he owned some livestock and had 38 acres of land under cultivation. Stating that his ambition was to devote all of his time to farming, he requested an agricultural deferment, assuring the board that he would increase production and contribute a satisfactory amount to the war effort and civilian use. He stated

[1] 50 USCA App. § 462, 32 CFR § 1632.14 (1951 ed.).
[2] See United States v. Borisuk, Slip Opinion, 3 Cir., July 14, 1953.

that the section (Series VI) as to ministers and students preparing for the ministry did not apply, but he requested a special form, SSS Form 150, for conscientious objectors.

In answering Form 150 he stated that he was a Jehovah's Witness, that since his youth he had studied the bible with the aid of the *Watchtower*, relying for guidance upon Richard Palms, the leader of the Kingdom Hall which he attended. He supplied a copy of the *Watchtower* as a statement of the creed of the Jehovah's Witnesses relative to participation in war. While when asked the question, "Have you ever given public expression . . . to the views expressed . . . as the basis for your claim made in Series I (Claim for Exemption)?" he answered "No", he did state that in addition to his factory and farm work he witnessed from door to door.

Based upon the foregoing, the local board classified him 1-A and notified him thereof on SSS Form 110. Defendant then wrote the local board as follows: "On the strength of my right to appeal my service classification, I wish to state that I am a minister of the gospel. On the strength of this fact I wish to appeal this classification and request a personal appearance to present evidence to this fact."

The local board granted him a personal appearance. Defendant appeared, answered questions and submitted a typewritten statement signed by him, an affidavit of Richard Palms and a copy of *Watchtower*. In his written statement defendant spoke of his witnessing activities, discussed ordination and the prerequisites thereof as understood by Jehovah's Witnesses. He worked in the factory to aid him in his farming, and in secular work to aid him in his ministry. He did not believe in taking part in armed conflicts. He spoke in favor of agricultural deferments and pointed to the provisions of the Act as to deferments of conscientious objectors and exemptions of ministers. He asked the board before making a decision to consider his assigned duties and the manner in which he was regarded by other

Jehovah's Witnesses, and not to rely upon any personal ideas, feelings or prejudices as to what constituted an ordained minister. The affidavit stated that for years on many occasions defendant engaged in preaching activities, that reports and records thereof were available. Such records and reports were not however produced.

The clerk of the local board testified that when defendant completed his presentation, the members of the board discussed the matter and the board chairman then told the registrant that his I-A classification would remain the same, his appeal would be honored; that if he was found acceptable after physical examination for the armed service his file would be forwarded to the appeal board.

On the cover sheet of defendant's file appears the following: "3/19/51. Board met with registrant. No action taken. See note in file." The note, dictated by the chairman of the board, reads as follows:

> "The board met with registrant today. The registrant informed the board that he left his place of employment on March 3, where he had worked for three years in a hat factory. The Board chairman immediately pointed out that he was classified as 1-A on February 21, which meant he left his position about two weeks later. He then mentioned that his father had a farm which had not been worked as a farm for 23 years but that he felt he was going to start getting this farm in shape. Prior to this time he stated he had gotten a few acres in shape for their own family use so that they would not be dependent upon other people.
>
> "The registrant then pointed out that he was a minister of the Gospel and the only evidence he presented to substantiate this fact was some paraphernalia from the Watchtower Association of

> the Jehovah Witness. The registrant was asked if he was an ordained minister and he said Jehovahs Witnesses became ordained when they started distributing their literature. The Board felt this was not sufficient evidence to warrant a 4-D classification and informed the registrant his case would be sent up to the Appeal Board following his physical examination."

Defendant being found physically acceptable his file was sent to the appeal board which in turn asked the Department of Justice for an advisory recommendation. The Department of Justice did not concur in the IV-E recommendation of its hearing officer and recommended rejection of defendant's claim stating "Registrant's inconsistent statements and his offer to contribute to the war effort are believed to be incompatible with a sincere conscientious objector's claim."

The appeal board voted 4-0 to classify defendant I-A and sent him Form 110 notifying him thereof. After he was ordered to report for induction, the file was reviewed by the State Selective Service headquarters; they in turn were not convinced of the validity of defendant's claim to be either a conscientious objector or a minister of religion, and therefore took no action to stay induction.

Defendant did not discontinue working in the factory until he was classified I-A. There was apparently some question as to the good faith of his farming activities. His offer to help the war effort was inconsistent with his claim to be a conscientious objector. His claim to be a minister was inconsistent with his answer in the classification questionnaire that that section did not apply. There was a question as to the quantum and quality of the proof offered as to the extent of his witnessing activities and of his claim to be a minister. See *Dickinson* v. *United States*, 9 Cir. 1953, 203 F. 2d 336 at 344; *Cox* v. *United States*, 332 U. S. 442 at

445, 68 S. Ct. 115, 92 L. Ed. 59. Defendant was not baptized until his case was on appeal.

On cross-examination the clerk of the local board said that when the chairman told the registrant his classification would remain the same he also stated that the matter was out of their hands because he had taken an appeal. It appears, however, that the board received and considered everything submitted by the defendant, decided that he was not entitled to a change of classification, and advised him thereof before he left the board room. As a matter of law the board could take no further action except to arrange for physical examination and, if defendant were found acceptable, send the file to the appeal board and await the outcome. See 32 CFR § 1624.2(e); *Id.* § 1624.3.

Defendant argues that the board's statement as to the effect of the appeal shows they did not properly consider his case. Further that the board did not comply with 32 CFR § 1624(c) because it did not again classify him "as if he had never before been classified", or send him notice of the classification anew on Form 110. *Id.* (d).

Applying the usual test appropriate to consideration of a motion for judgment of acquittal, see *United States* v. *Stoehr,* D. C. M. D. Pa. 1951, 100 F. Supp. 143 at 149, affd. 3 Cir., 196 F. 2d 276, and the teachings of the cases defining the scope of review in Selective Service cases, see *Estep* v. *United States* 327 U. S. 114, at 120, 66 S. Ct. 423, 90 L. Ed. 567; *Cox* v. *United States, supra,* 332 U. S. at 448; *Eagles* v. *Samuels,* 329 U. S. 304 at 314, 67 S. Ct. 313, 91 L. Ed. 308; *United States* v. *Nugent,* 346 U. S. 1 at 9, 10, did either the local or appeal boards exceed their jurisdiction? Did they proceed arbitrarily and without due regard to the rights of the registrant or make the classification without basis in fact to support it?

The decisions of the board may not be set aside if they

are supported by evidence[3] and must be accepted even though they may be erroneous. The inquiry is not whether the court would reach a different result from the evidence before the draft board. *Dickinson* v. *United States, supra,* 203 F. 2d at 343.

The burden is upon the registrant to bring himself within the excepted class. *United States* v. *Jewell,* 112 F. Supp. 327 at 329. He must establish either a complete lack of factual basis for his classification, some controlling bias or prejudice against him (*Swaczyk* v. *United States,* 1 Cir. 1946, 156 F. 2d 17 at 19), or a deprivation of basic and procedural safeguards, i.e., procedural error so flagrant as to result in an unfair hearing. *Eagles* v. *Samuels, supra,* 329 U. S. at 312; *Kotteakos* v. *United States,* 328 U. S. 750 at 757 *et seq.,* 66 S. Ct. 1239, 90 L. Ed. 1557.

Receiving and considering everything the registrant submitted (Ex Parte *Stanziale, supra,* 138 F. 2d at 315), considering all possible classifications (*Cox* v. *Wedemeyer,* 9 Cir. 1951, 192 F. 2d 920 at 922; see and cf. *United States* v. *Rubinstein,* 2 Cir. 1948, 166 F. 2d 249 at 257; *United States* v. *Schoebel,* 7 Cir. 1953, 201 F. 2d 31), coming to a decision thereon, advising the registrant as to the result thereof, and placing a proper summary in the files constitutes *de novo* consideration. *Atkins* v. *United States,* 10 Cir. 1953, 204 F. 2d 269 at 271.

The Department of Justice and the appeal board were free, if there was a proper factual basis, to reject the recommendation of the hearing officer. *United States* v. *Nugent, supra,* 346 U. S. 1.

"It was the board's duty to pass on the question of which was the believable evidence and upon the soundness of the objection." *United States* v. *Bender,* 3 Cir., Slip Opinion,

[3] Cf. Cox v. United States, *supra,* 332 U. S. 442; Smith v. United States, 4 Cir. 1946, 157 F. 2d 176 at 178; United States v. Cain, 2 Cir. 1944, 144 F. 2d 944 at 947; *Ex Parte* Stanziale, 3 Cir. 1943, 138 F. 2d 312 at 315.

July 21, 1953; *Dickinson* v. *United States, supra,* 203 F. 2d at 345.

The questions here presented are for the court. *United States* v. *Roberson,* 108 F. Supp. 423; *Elder* v. *United States,* 9 Cir. 1953, 202 F. 2d 465 at 466; *Cox* v. *United States, supra,* 332 U. S. at 452-453.

Considering the proof necessary to constitute one a minister, as defined by the Act, 50 USCA App. § 456(g) Pocket Supp., and discussed in the cases, see *Cox* v. *United States, supra,* 332 U. S. at 445, 449 *et seq.; Dickinson* v. *United States, supra,* 203 F. 2d at 343, 345; *Rase* v. *United States,* 6 Cir., 129 F. 2d 204 at 209; *Martin* v. *United States,* 4 Cir. 1951, 190 F. 2d 775 at 777; *United States* v. *Kose,* 106 F. Supp. 433 at 434; *United States* v. *Bartelt,* 7 Cir. 1952, 200 F. 2d 385 at 388, we are convinced that the board had adequate basis in fact in the record to deny the defendant classification as a minister, regular or ordained, and that there is nothing in the record to justify any contention that the board acted arbitrarily or unreasonably or other wise abused its discretion in doing so. Likewise as to his conscientious objector claim (50 USCA App. § 456(j); *United States* v. *Annett,* 108 F. Supp. 400 at 402), and the request for an agricultural deferment. *Imboden* v. *United States,* 6 Cir. 1952, 194 F. 2d 508 at 510.

Unlike the situation in *United States* v. *Zieber,* 3 Cir. 1947, 161 F. 2d 90 at 91, the board here was clear as to the status of defendant's case, i.e., the distinction between passing upon a request for a change of classification and a right to appeal. In *United States* v. *Stil* , 3 Cir. 1948, 169 F. 2d 455, the board took no action upon the registrant's claim for a change of classification but sent the file forthwith to the appeal board. A like situation occurred in *Knox* v. *United States,* 9 Cir. 1952, 200 F. 2d 398 at 400, and in part in *United States* v. *Fry,* 2 Cir. 1953, 203 F. 2d 638. We agree

wholeheartedly that §§ 1624.2(c) and (d) should be complied with. There is no table of weights and measures for ascertaining what constitutes due process.[4]

We think, however, that the sections were substantially complied with and that the defendant was in no manner prejudiced by what actually occurred. The situation in *Martin* v. *United States, supra,* 190 F. 2d at 778, 779, is quite opposite, and see *Atkins* v. *United States, supra,* 204 F. 2d at 271; *United States* v. *Kose, supra,* 106 F. Supp. at 434, where a letter was sent instead of Form 110. The court in *Knox* v. *United States, supra,* 200 F. 2d at 401, agreed with the limitations expressed by Judge Parker in the *Martin* case, and see *United States* v. *Fry, supra,* 203 F. 2d at 640.[5]

In the light of the foregoing, we have no alternative but to deny defendant's motion. An order to that effect will be handed down this date.

JOHN W. MURPHY
United States District Judge

September 25, 1953

[4] See dissenting opinion of Mr. Justice Frankfurter in Burns v. Wilson, 346 U. S. 137 at 149.

[5] In United States v. Strebel, 103 F. Supp. 628 at 631, defendant was prevented from presenting additional evidence. United States v. Laier, 52 F. Supp. 392, and United States v. Romano, 103 F. Supp. 597, defendant was denied a personal appearance. United States v. Graham, 108 F. Supp. 794, absent new evidence the board felt it could not reconsider defendant's classification, but see Davis v. United States, 6 Cir. 1952, 199 F. 2d 689 at 691. As to the reference to *Ex Parte* Fabiani, 105 F. Supp. 139, in United States v. Graham, *supra*, see and cf. United States v. Nugent, *supra*, 346 U. S. at 9, 10.

JUDGMENT AND COMMITMENT

Scranton, Pa.

On this 12th day of October, 1953, came the attorney for the Government and the defendant appeared in person and by counsel: Darlington Hoopes, Esq., 26 N. 6th St.. Reading, Pa.

IT IS ADJUDGED that the defendant has been convicted upon his plea of Not Guilty and a Verdict of Guilty of the offense of Violation 50 USCA 451; 462 "Selective Service Act of 1948"; and Proclamation of the President and Selective Service Regulations, as charged in one count of indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Three (3) Years.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ JOHN W. MURPHY
United States District Judge.

[fol. 61] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,185

UNITED STATES OF AMERICA

v.

PHILIP ANDREW WITMER, Appellant

Appeal from the United States District Court for the Middle District of Pennsylvania

Argued February 2, 1954

Before Goodrich, McLaughlin and Hastie, Circuit Judges

OPINION OF THE COURT—Filed May 13, 1954

Per CURIAM:

This case, like its companion case of United States v. Hagaman, which opinion is filed this day, raises two questions. One is the procedural point. This point is exactly like that in the Hagaman case in that the registrant was notified orally, after personal appearance before the local Board, that his classification would not be changed. He was not given a written notice. But he did have knowledge of the Board's action and he did have his appeal. What we have said in Hagaman, and our reliance there on the Martin and Atkins decisions, applies here.

The other point in the case is the claim that the Board's classification had no basis in fact. Witmer claimed agricul-
[fol. 62] tural, ministerial, and conscientious objector classifications in a series of claims. Of course this is not, itself, conclusive; a man has a right to raise as many points as he has. But there were inconsistencies in his claims; he was willing to help the war effort by raising food for it, he said, but not to bear arms. His ministerial claim was easily negatived. After going through the record we think there was ample to let the administrative authorities conclude that none of his claims was well-founded.

The whole matter was thoroughly discussed by Judge

Murphy in his opinion, 115 F. Supp. 19 (M. D. Pa. 1953), and we cannot add helpfully to it except to point out that since it was written the Ninth Circuit was reversed in the Dickinson case by the Supreme Court, Dickinson v. United States, 346 U. S. 389 (1953).

The judgment of the district court will be affirmed.

A true Copy. Teste:

—— ——, Clerk of the United States Court of Appeals for the Third Circuit.

[fol. 63] [Stamp:] Received & Filed May 13, 1954. Ida O. Creskoff, Clerk

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,185

UNITED STATES OF AMERICA

vs.

PHILIP ANDREW WITMER, Appellant

On Appeal from the United States District Court for the Middle District of Pennsylvania

Present: Goodrich, McLaughlin and Hastie, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest.

Ida O. Creskoff, Clerk.

May 13, 1954.

[fol. 64] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 65] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. —

PHILIP ANDREW WITMER, Petitioner,

vs.

UNITED STATES OF AMERICA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 30, 1954.

Harold H. Burton, Associate Justice of the Supreme Court of the United States.

Dated this 1st day of June, 1954.

[fol. 66] IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,189

UNITED STATES OF AMERICA

v.

WILLARD ROGER HAGAMAN, Appellant

Appeal from the United States District Court for the Middle District of Pennsylvania

Argued February 2, 1954
Reargued March 19, 1954

Before Biggs, Chief Judge, and Maris, Goodrich, McLaughlin, Kalodner, Staley and Hastie, Circuit Judges.

OPINION OF THE COURT—Filed May 13, 1954

By Hastie, Circuit Judge.

This is an appeal from a conviction for failing and refusing to be inducted into the armed forces of the United [fol. 67] States after being ordered to do so.[1] There is no doubt that the appellant, Hagaman, refused to be inducted into the armed forces. The defense to the criminal prosecution is that he was not obliged to obey the order to report and be inducted because the order was predicated upon Selective Service classification so improper that a court, acting within judicial province as defined in *Estep* v. *United States,* 1946, 327 U. S. 114, should declare it invalid.

Hagaman makes three distinct contentions: first, that the local board failed to follow prescribed procedure; second, that his claim to deferment as a minister of religion was

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[1] "[A]ny person who . . . evades or refuses registration or service in the armed forces . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . ." 50 U. S. C. A. App. § 462(a).

repected arbitrarily; and third, that the National Appeal Board had no basis for action it took changing his 1-O classification to 1-A.

All of us agree that the first and second contentions are without merit. The reasons for that conclusion appear in the opinion of Judge Goodrich. However, it is the decision of the court that appellant's third contention is sound and, therefore, that the conviction cannot be sustained.

This is the reasoning on the decisive third point which seems sound to a majority of the court. The registrant, claiming to be both a minister of religion and a conscientious objector, appealed to his district board from his local board's order placing him in class 1-A. On that appeal, in accordance with established procedure, the file was referred to the Department of Justice for advisory opinion. Honorable Curtis Bok, sitting as hearing officer for the Eastern District of Pennsylvania, then heard the registrant and filed his report and recommendation expressing his strong and complete conviction that the young man was sincere and was entitled at least to a conscientious objector classification. The Department of Justice so recommended and the [fol. 68] five member district board by unanimous vote so decided, classifying the registrant 1-O.

Thereafter, the registrant, still believing that he was entitled to the additional exemption of a minister, caused the director of Selective Service to appeal the 1-O conscientious objector classification, thus placing the whole matter before the National Appeal Board for reconsideration. That board, by a two to one vote, without stating any reason, and apparently without any additional evidence, not only denied the ministerial classification but revoked the conscientious objector classification and placed the registrant in class 1-A.

Thus, the present attack upon registrant's classification does not raise the question whether the local board had any justification for the initial 1-A classification,—and we do not suggest that it did—but rather whether the national board had any allowable basis for replacing the 1-O classification put into effect by the district board with its own 1-A classification. This distinction is important because the national board, very much like the court in this proceeding, seems merely to have reviewed the record made

below, while the district board had made its 1-O classification on the basis of new matter, a report of a *de novo* hearing before an examiner and the resulting recommendation of the Department of Justice,[2] in addition to the local board file.

Upon what did the national board predicate its decision? We can look at the record and see what the considerations must have been for and against the claim of ministerial exemption. But the record does not disclose what it was that moved the national board to change the 1-O classification to 1-A. There certainly was very obvious basis in the record for the district board's action in classifying registrant as a conscientious objector. We are left to specu- [fol. 69] late why the national board refused to accept that showing.

The Court of Appeals for the Sixth Circuit disposed of a record very much like this one by saying merely that, since there was no evidence contradicting the registrant's claim or inconsistent with his actual classification as a conscientious objector, and the national board acted merely on the file without taking testimony, the reclassification from 1-O to 1-A "was arbitrary and capricious, and without basis in fact." *Jewell* v. *United States*, 6 Cir. 1953, 208 F. 2d 770; *cf. United States* v. *Alvies*, N. D. Cal. 1953, 112 F. Supp. 618. Even more recently the Court of Appeals for the Fourth Circuit has disposed of such a record by saying "An examination of the file shows that there is nothing therein contradictory of the facts stated in the . . . [report and] recommendation [of the Department of Justice] and nothing upon which appellant could be denied his claim of exemption as a conscientious objector. The order giving him the classification 1-A, having no support in the record, is therefore void." *Pine* v. *United States*, No. 6720, decided April 5, 1954. In a somewhat similar situation the Court of Appeals for the Second Circuit reversed a denial of habeas corpus and remanded the case to the district court to determine as a fact the basis upon which the conscien-

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[2] A regulation requires the Board to "consider" the report and recommendation of the Department of Justice. 32 C. F. R. § 1626.25(c).

tious objection claim had been rejected. *United States* ex rel. *Reel* v. *Badt*, 2 Cir. 1944, 141 F. 2d 845.

In the case last cited the court indicated that such agencies as these boards should make their processes "sufficiently explicit to reveal so far as may be reasonably practicable, whether or not they are keeping within the statute under which they purport to act." 141 F. 2d at 848. Of course such disclosure need not be technical or elaborate. And it is not necessary at all in the usual case where the issue in controversy and the basis of decision are made apparent by the record itself. But in cases like the one now before us, the reclassifying board should indicate in a general and non-technical way it changed the classification.

[fol. 70] However, we are reluctant to reverse on this procedural deficiency, if there is any satisfactory way of reaching the merits of the case. For that reason we have searched the record for possible bases of reclassification, though none has been made explicit or even inferentially clear. We find just two possibilities. The board may have thought that as a matter of law the showing made did not meet the statutory requirements for classification as a conscientious objector.[3] Or it may have disbelieved the registrant's testimony as to his convictions about participation in war.

We are inclined to believe that the national board proceeded on the first ground, taking the position that as a matter of law Jehovah's Witnesses are not conscientious objectors. This impression is based in large part upon the fact that in recent months Courts of Appeal have had to consider a whole series of rather similar cases where unexplained orders of the national board changing the classification of Jehovah's Witnesses from 1-O to 1-A make sense only if they represent a consistent administrative application of this understandable, if mistaken, legal theory. *Pine* v. *United States*, 4 Cir. 1954, *supra*; *Jewell* v. *United States*, 6 Cir. 1953, *supra*; *United States* v. *Hartman*, 2 Cir.

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[3] Section 6(j) of the Universal Military Training and Service Act exempts from combatant training and service a registrant "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." 50 U. S. C. App. § 456(j).

1954, 209 F. 2d 366; *cf. Taffs* v. *United States*, 8 Cir. 1953, 208 F. 2d 329, *cert. den.* 1954, 347 U. S. 928. Indeed, the government urged this legal point in its brief on the present appeal. It was pointed out that the registrant as one of Jehovah's Witnesses predicates his opposition to war on the tenets of the Watchtower Bible and Tract Society. Admittedly, that religious organization disapproves international war but sanctions "theocratic war." Hence, it was contended that Jehovah's Witnesses are not taught opposition "to participation in war in any form." But on oral argument in this case that contention was abandoned [fol. 71] in the light of impressive decisions against the government on the very point since Hagaman's conviction. *Taffs* v. *United States, supra; United States* v. *Hartman, supra.* Thus, it is now conceded that the national board was wrong if it reclassified the registrant on the theory that his professed creed would not sustain a claim of conscientious objection to war.

But what if, apart from this legal question, the national board did not believe the registrant was sincere in his professions? Was the national board entitled, on the paper record alone, thus to discredit and reject the registrant's proof which had been so convincing to the hearing officer and the district board? *Jewell* v. *United States, supra,* and *Pine* v. *United States, supra,* both strike down such action as arbitrary. But here the government argues that such disbelief of the registrant might properly have been based on the fact that this young man, one of whose parents was a Jehovah's Witness, had not himself embraced that faith until he was seventeen years old at a time just three months before he registered for Selective Service. However, such rejection of testimony would have reflected the antithesis of the normal and proper unwillingness of a reviewing agency, which has not heard a witness, to reverse a judgment as to his credibility. Beyond that, it is a striking example of the very type of refusal to credit the evidence on the basis of suspicion and speculation, no conflict appearing on the face of the record, which the Supreme Court disapproved very recently in *Dickinson* v. *United States*, 1953, 346 U.S. 389. It does not matter whether we accept the statement of the majority in the *Dickinson* case, that "... the courts may properly insist that there be some proof

that is incompatible with the registrant's proof of exemption," or the complaint of the dissenters, that "Under today's decision, it is not sufficient that the Board disbelieve the registrant. The board must find and record affirmative evidence that he has misrepresented his case . . ." 346 U. S. at 396, 399. Under either formulation we would have to [fol. 72] assume that the national board here did just what the Supreme Court disapproved, and, different from the *Dickinson* case, in the face of the strong contrary conviction of the district board as well as the hearing officer before whom the registrant had appeared. In these circumstances, the classification cannot stand on the possibility that the national board was unwilling to credit the registrant's testimony as to conscientious objection to participation in war.

In *United States* ex rel. *Reel* v. *Badt, supra,* the Court of Appeals for the Second Circuit sent the case back to the district court for a further hearing because on the record it could only speculate whether the classification was made on a lawful or an unlawful basis. Here, we are satisfied that neither of the possible bases was proper. The 1-O classification was changed to 1-A either on a theory which the government now concedes to be legally wrong, or by an arbitrary decision on the facts. The reclassification was invalid and induction could not lawfully be required.

The judgment will be reversed.

GOODRICH, Circuit Judge, dissenting in part.

While this opinion is termed a dissent, the first two points discussed represent the opinion of all the members of the Court. They are: (1) Procedural due process; (2) The refusal to classify Hagaman as a minister of religion. The dissent by the minority comes upon the conscientious objector point discussed in Judge Hastie's opinion, which is joined in by enough of his colleagues to constitute a majority of the Court.

We turn to the procedural point first. Hagaman says he was denied procedural due process. After the filing of his questionnaire he received from his local Board a classification of 1-A. He requested a personal interview, to which

[fol. 73] he was entitled under the regulations.[1] He had a personal interview. The Board heard him fully. Then he was told orally that his classification would not be changed and that he could appeal.[2] He did appeal; in fact his appeal went to the highest administrative authority, the National Selective Service Appeal Board.

The basis for Hagaman's complaint is that the local Board did not formally "reclassify" him after the personal interview as the regulations require. It is true that the regulations at the time of the events here did provide both for a formal reclassification and notification by mail.[3] It is also true that courts of appeals have reversed convictions

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[1] "*Opportunity to appear in person.* (a) Every registrant, after his classification is determined by the local board . . . shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (SSS Form No. 110) to him." 32 Code Fed. Regs. § 1624.1 (1949). Substantially the same provision appears in the present regulation, 32 Code Fed. Regs. § 1624.1(a) (1951).

[2] The Board's minutes state: "Registrant told he would remain 1-A and case not reopened." On the same day as this hearing, the Board for the second time sent Hagaman a Notice of Classification as 1-A.

[3] "(c) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board shall consider the new information which it receives and shall again classify the registrant in the same manner as if he had never before been classified.

"(d) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board, as soon as practicable after it again classifies the registrant, shall mail notice thereof on Notice of Classification (SSS Form No. 110) to the registrant and on Classification Advice (SSS Form No. 111) to the persons entitled to receive such notice or advice on an original classification under the provisions of section 1623.4 of this chapter." 32 Code Fed. Regs. § 1624.2 (1949).

of registrants when their rights were prejudiced by failure of notification. *United States* v. *Stiles*, 169 F. 2d 455 (C.A. 3, 1948), explaining *United States* v. *Zieber*, 161 F. 2d 90 (C.A. 3, 1947); *United States* v. *Fry*, 203 F. 2d 628 (C.A. 2, 1953).

It is one thing, however, to protect a man when he is prejudiced by the failure of administrative authorities to observe the precautions taken to guard his rights. It is an- [fol. 74] other thing to create an administrative procedure, designed to be handled by volunteer laymen in communities throughout the nation, as technical and ritualistic as common law pleadings. We have said in an earlier opinion that a registrant is not obliged to make his points with his draft board in the fashion required of a well-trained lawyer, *United States* ex rel. *Berman* v. *Craig*, 207 F. 2d 888 (C.A. 3, 1953). It is likewise true that the board's proceedings do not need to be recorded with the meticulous accuracy with which an experienced corporation counsel draws a set of corporate minutes.

The present case is like *Martin* v. *United States*, 190 F. 2d 775 (C.A. 4, 1951), followed in *Atkins* v. *United States*, 204 F. 2d 269 (C.A. 10, 1953) in which the court refused to "quibble over terminology."

The course of decision on this matter has been a commendable one. If a registrant has been denied a chance to exercise rights given him under the statute and regulations his conviction has been reversed, as in the *Zieber*, *Stiles*, and *Fry* cases, cited above. On the other hand, as in the *Martin* and *Atkins* cases, where there has been substantial compliance, so that a man has had all the consideration due him, the courts have refused to reverse for mere technical irregularities. That, we believe, works substantial justice.[4]

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[4] Under the present regulations, the board need not reclassify the registrant in the absence of new information justifying such a change. "(c) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board shall consider the new information which it receives and, if the local board determines that such new information justifies a change in the registrant's classification, the local board shall reopen

We pass, therefore, to appellant's complaint that there is no support in the record for the classification given him. Since *Estep* v. *United States*, 327 U.S. 114 (1946), we are bound to make this inquiry, and if there is no basis in fact [fol. 75] for the classification we must reverse the conviction. *Dickinson* v. *United States*, 346 U.S. 389 (1953); *Annett* v. *United States*, 205 F. 2d 689 (C.A. 10, 1953); *United States* v. *Pekarski*, 207 F. 2d 930 (C.A. 2, 1953); *Taffs* v. *United States*, 208 F. 2d 329 (C.A. 8, 1953), cert. denied, 347 U.S. 928 (1954); *Schuman* v. *United States*, 208 F. 2d 801 (C.A. 9, 1953); *Jewell* v. *United States*, 208 F. 2d 770 (C.A. 6, 1953); *United States* v. *Hartman*, 209 F. 2d 366 (C.A. 2, 1954); *United States* v. *Kobil* (E.D. Mich. 1951) (unreported); Ex parte *Fabiani*, 105 F. Supp. 139 (E.D. Pa. 1952); *United States* v. *Graham*, 109 F. Supp. 377 (W.D. Ky. 1952); *United States* v. *Alvics*, 112 F. Supp. 618 (N.D. Cal. 1953); *United States* v. *Loupe* (D.N.J. 1953) (unreported); *United States* v. *Burnett*, 115 F. Supp. 141 (W.D. Mo. 1953); *United States* v. *Lowman*, 117 F. Supp. 595 (W.D.N.Y. 1954); *United States* v. *Benzing*, 117 F. Supp. 598 (W.D.N.Y. 1954).

We start then with the task "to search the record for some affirmative evidence to support the local board's overt or implicit finding that a registrant has not painted a complete or accurate picture of his activities." *Dickinson* v. *United States*, *supra*, at 396.

We consider first the matter of Hagaman's claim to be classified as a minister of religion and, therefore, exempt from the draft under 50 U.S.C.A. App. §456(g). It is settled that merely because he belongs to the body known as Jehovah's Witnesses, all of whose members claim to be ministers to preach the gospel to all the nations, he does not thereby become entitled to the ministerial exemption under the statute and regulations. *Dickinson* v. *United States*,

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and classify the registrant anew. If the local board determines that such new information does not justify a change in the registrant's classification, it shall not reopen the registrant's classification." 32 Code Fed. Regs. §1624.2 (1951). However, the notification requirement remains the same. See 32 Code Fed. Regs, § 1624.2(d).

supra, at 394; *Cox* v. *United States*, 332 U.S. 442, 449-450 (1947). The ministerial exemption is a narrow one and [fol. 76] has been rather fully described in the statute.[5] The burden is on the registrant to show that he comes within it. *Dickinson* v. *United States*, *supra* at 395.

The administrative authorities were justified in finding that Hagaman did not so qualify. It is true that he was baptized at the age of eighteen in to the "ministry" of this sect. And he claims to have been a minister from June, 1948, when he joined Jehovah's Witnesses. Of course, this

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[5] "(1) The term 'duly ordained minister of religion' means a person who has been ordained, in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.

"(2) The term 'regular minister of religion' means one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister.

"(3) The term 'regular or duly ordained minister of religion' does not include a person who irregularly or incidently preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the cremonial rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization." 50 U.S.C.A. App. § 466(g).

is simply the claim all members make and, as said above, we must go further to find that he was a minister in the statutory sense. If, as pointed out in the *Dickinson* case, the flock is not to be left without a shepherd, it is equally true that the flock cannot consist of shepherds only.

When Hagaman was asked in the special form for conscientious objectors to name "the pastor or leader of such church, congregation, or meeting" he answered that it was one P. L. Talarico, who was the "company servant" for [fol. 77] this particular group in Fort Lauderdale, Florida.[6] Hagaman shows some evidence of preaching activities, but those instances are only seven in number at most.[7] It is true that Mr. Talarico, the company servant in Fort Lauderdale, wrote a letter in which he said he considered Hagaman "a regular minister of religion." He followed that statement by saying he "would not hesitate to assign him any of the duties regularly and customarily performed by an ordained minister," such as "conducting Bible studies, baptismal services, funeral discourses, marriage ceremonies," and so on. But "not hesitate to assign" is not the same as being assigned and carrying on these duties. There is evidence, undoubtedly, that Hagaman did engage in some religious activity, which he, himself, described as similar to

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[6] In the *Dickinson* case, supra, defendant was the "company servant" for Coalinga, California, and proved extensive preaching activities. We do not mean to indicate that only those Witnesses who are "company servants" can be exempted as ministers. See *Cox* v. *United States, supra*, at 449-450.

[7] In connection with one of those instances, there is an unexplained inconsistency, the significance of which we are perhaps not required to pass on. In the Board's file, which is in evidence, there is a photostat of a letter, dated May 2, 1951, from a man named Bruce E. Griffin in which he asked Hagaman to take his place in giving a discourse on Sunday, May 27, 1951. A circular announcement of the discourse accompanies the letter. But the postmark upon the photostat of the envelope attached thereto bears date June 3. The claim for deferred classification had been made in March, 1951.

that done by deacons in other denominations.[8] Everybody knows that a great deal of church work in every demonination is done by persons who devote themselves without compensation to the task. We know, too, that in many denominations laymen frequently make religious talks without thereby achieving in their own or anyone's mind any "ministerial status."

This case presents a problem of deciding on which side of the line Hagaman's activities fell. There were some things to indicate employment in a ministerial capacity. There were others to indicate that he had not reached in the serv- [fol. 78] ice of Jehovah's Witnesses the place where he could be called a "ministe." in the sense in which that term is used by the United States, however it may be used by Jehovah's Witnesses. That being the case, the decision is for the administrative authorities. *Estep* v. *United States*, *supra*, at 122.

We now come to the point on which the Court divides. We do not disagree with the majority here and the judges in other circuits who have refused to reject all Jehovah's Witnesses from the conscientious objector category because of the "theocratic warfare" point. But we do not see any basis for assuming that Hagaman's classification as a conscientious objector was made because of Jehovah's Witnesses' adherence to the doctrine of "theocratic warfare," whatever that may mean.

The conscientious objector claim, it may be agreed, is the most difficult point in the case. If, as the majority in the *Dickinson* case says, the draft boards are now to be obliged to build a record, we still have the question of how much of a record it is going to take to support their conclusions. Decisions have said that mere suspicion is not enough, *Dickinson* v. *United States*, *supra*, at 397; *Schuman* v. *United States*, 208 F. 2d 801 (C.A. 9, 1953). On the other

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[8] Hagaman was admitted several weeks before he filled out his questionnaire to the group called "pioneers." Pioneers, as we understand it, are not "company servants" but are a step up in ranks of the hierarchy from ordinary members. They are obliged to perform 100 hours a month in the group service. Hagaman's comparison to the work done by the deacons in other denominations seems to us quite apt.

hand we do not suppose that the courts are going to require draft boards to go out and make investigations in the community and bring into their hearings witnesses to oppose claims for classification made by registrants. If they must do so, the administration of selective service laws will become a much more highly complicated process than it now is.

The question in this case, we think, should turn upon the administrative body's conclusion as to the sincerity of Hagaman's claim to be a conscientious objector. He did not have the same family background of membership in Jehovah's Witnesses that many others have had whose claims for conscientious objector classifications have come [fol. 79] into litigation.[2] One parent was a Jehovah's Witness; the other was a Lutheran. The parents did not live together. The boy spent part of his time with each. When he was sixteen he entered the John B. Stetson University in Deland, Florida, a Baptist institution. In the document filled out at the time of his registration there in 1946 he gave his religious preference as Lutheran. He had two years of a Business Administration course at Stetson. He registered for the draft in September, 1948. He had joined Jehovah's Witnesses just three months before that.

People do change their religious views, of course, and there is no disposition on our part to deny the sincerity of a Road to Damascas conversion. On the other hand when such conversion comes a very short time before one may become liable for military service, the question is suggested whether the conversion is a real or pretended one. That obviously, is a question of fact. The question of fact was passed upon by the local Board in the first instance unfavorably to the registrant. That body not only had the registrant's papers before it, but also had the benefit of hearing and seeing him in a personal interview. The hearing officer on appeal believed in Hagaman's sincerity after seeing him and that appeal sustained the conscientious objector classification though denying the ministerial exemption. The final appeal restored the 1-A classification which the local Board had given.

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[2] As for instance in *Pine* v. *United States*, cited in the majority opinion.

When trial courts pass upon a question of fact, courts of appeals are to accept their conclusions unless clearly erroneous. When the question of fact is whether a given witness or litigant is telling the truth, it takes a very strong set of circumstances to prevail against the conclusion reached by the fact finder. Surely our supervision over the fact finders in the selective service process is not greater than that over trial courts. Legal questions, of course, we decide as we have in the first part of this opinion. And [fol. 80] ultimate conclusions from evidentiary facts we can also pass upon to some extent. That is what we think the Supreme Court did in the *Dickinson* case, which dealt with the fact material out of which the claim for ministerial exemption arose. That is what we have done in the portion of this opinion dealing with the claim for exemption as minister. But when the question turns on a man's motives, review of the factual determination is a different thing. Two of the three bodies who have had Hagaman's case before them have ruled against his contention. We believe the factual conclusion should stand.

A suggestion from judicial sources that boards of appeals file reasons for conclusions is one which would make judicial review easier of course. "Opinions are required in our legal system in order that the reasoning which justifies a conclusion may be made manifest." Frankfurter, J., dissenting in *Darr* v. *Buford,* 339 U.S. 200, 225 (1950). But the Congress, in setting up draft boards and the various boards of appeals, did not require findings of fact, conclusions of law or opinions. We do not think that judges are authorized to impose such a requirement.

All of us think that the judgment of the district court should be affirmed on the first two points stated above. But the majority overrules us on the point of the conscientious objector classification.

Judges McLaughlin and Staley join in the dissenting portion of this opinion.

[fol. 81] SUPREME COURT OF THE UNITED STATES—October Term, 1954

No. 164

PHILIP ANDREW WITMER, PETITIONER

vs.

UNITED STATES OF AMERICA

ORDER ALLOWING CERTIORARI—Filed October 14, 1954.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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Supreme Court of the United States

OCTOBER TERM, 1954

No. 164

PHILIP ANDREW WITMER,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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HAYDEN C. COVINGTON
124 Columbia Heights
Brooklyn 1, New York
Counsel for Petitioner

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1624.3 9
1626.25 ..... 2, 10
1626.26 12

United States Code, Title 28, § 1254(1) 2
United States Code, Title 50, App. §§ 451-470 ("Universal Military Training and Service Act")
—Section—
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6(j) 2, 5, 23
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MISCELLANEOUS CITATIONS

Selective Service System, *Conscientious Objection*, Special Monograph No. 11, Vol. I, pp. 29-66, Washington, Government Printing Office, 1950 .. 27

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No.

PHILIP ANDREW WITMER,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, affirming the judgment of the United States District Court for the Middle District of Pennsylvania convicting the petitioner of a violation of the Universal Military Training and Service Act and sentencing him to the custody of the Attorney General.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported.

It appears in the record. [61-62][1] A memorandum opinion of the district court also appears in the record. [52-59] It is reported in 115 F. Supp. 19. The opinion by the Court of Appeals in the companion case of *United States* v. *Hagaman*, referred to in the opinion in this case by the Court of Appeals is an appendix to this petition, page 37.

JURISDICTION

The judgment of the Court of Appeals was entered on May 13, 1954. [62] The time for filing this petition for writ of certiorari has been extended to June 30, 1954. This petition for writ of certiorari is filed within the extended time. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).—See also Rules 37(b)(2) and 45(a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

I.

Section 6(j) of the act and Section 1626.25 of the Selective Service Regulations provide for the reference of the conscientious objector claim to the Department of Justice for appropriate inquiry and hearing. This is followed by a recommendation by the department to the appeal board on the conscientious objector claim. Petitioner had a hearing, after inquiry, that was followed by a report of the hearing officer to the Department of Justice and a recommendation by the Assistant Attorney General to the appeal board. The hearing officer of the department found petitioner to be a sincere and bona fide member of Jehovah's Witnesses, but the Assistant Attorney General recommended against the conscientious objector status. The draft board file of petitioner showed that while he was conscientiously opposed to direct participation in the armed forces he was willing to work and did work on a farm.

[1] Numbers appearing herein within brackets refer to pages of the printed record in this case.

While the Department of Justice hearing officer did not place any weight on his willingness to help in the defense of the country by farming the Assistant Attorney General in his recommendation to the appeal board did consider this as a basis for the denial of the conscientious objector status. The Court of Appeals denied the classification also for this reason stated by the Assistant Attorney General in his memorandum. The Court of Appeals held that because petitioner was willing to contribute to the war effort by working on a farm he was not a conscientious objector.

A question presented, therefore, is whether the act and the regulations permit the Department of Justice to recommend to the appeal board to deny, and may the appeal board deny, the conscientious objector status because the petitioner, an objector to direct participation in the armed forces, is willing to work on a farm and produce food that might be held to be indirect participation in the war effort.

II.

The undisputed evidence showed that petitioner had conscientious objections to participation in both combatant and noncombatant military service. He showed that these objections were based on his sincere belief in the Supreme Being. The file established without dispute that his obligations were superior to those owed to the state or which arose from any human relation. There was no showing that these beliefs flowed from any political, philosophical or sociological views. The undisputed evidence showed that the objections were based solidly on the Word of God and the obligations that Witmer had to the Supreme Being.

The question here presented, therefore, is whether the the denial of the claim for classification of petitioner by the appeal board as a conscientious objector was without basis in fact and, consequently, the final I-A classification was arbitrary and capricious.

III.

Section 1624.2(b) of the Selective Regulations provides for an oral hearing upon personal appearance by the registrant. Section 1624.2(c) requires that the case be reopened and that the registrant be reclassified. Witmer exercised his right under the regulation by requesting a personal appearance. At the hearing he was told that his case was out of the hands of the board because he had taken an appeal. Witmer had simultaneously requested a hearing and taken an appeal which was proper under the regulations. The board did not reopen and reconsider the classification, but told the registrant to take his appeal at the hearing.

The Court of Appeals held that because the local board told him it was not going to reopen and reclassify, thus giving him notice of the illegal action and deprivation of due process of law and he followed their directions and appealed such cured the deprivation of a right to a full and fair hearing.

The question, therefore, presented to this Court is whether a local board can deny a full and fair hearing upon personal appearance by not considering the case through refusal to reopen and reclassify petitioner and then cure that deprivation of due process of law by merely giving notice of such illegal action.

STATUTE AND REGULATIONS INVOLVED

Section 1(c) of the Universal Military Training and Service Act (50 U. S. C. App. (Supp. V) § 451(c)) provides:

> "The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."—June 24, 1948,

ch. 625, title I, § 1, 62 Stat. 604, amended June 19, 1951, ch. 144, title I, § 1(a) 65 Stat. 75.

Section 6(j) of the act (50 U. S. C. App. (Supp. V) § 456(j), 65 Stat. 75, 83, 86) provides:

> "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. Any person claiming exemption from combatant

training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice

> together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors."—50 U. S. C. App. (Supp. V) § 456(j), 65 Stat. 75, 83, 86.

Section 12(a) of the act (50 U. S. C. App. (Supp. V) § 462(a)) provides:

> ". . . Any . . . person . . . who . . . refuses . . . service in the armed forces . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . ."

Section 1622.14 of the Selective Service Regulations (32 C. F. R. § 1622.14 (1951 Rev.)) provides:

> *"Conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest.* (a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to both combatant and noncombatant training and service in the armed forces."

Section 1624.1(a) of the Selective Service Regulations provides:

"*Opportunity to Appear in Person.*—(a) Every registrant, after his classification is determined by the local board (except a classification which is itself determined upon an appearance before the local board under the provisions of this part), shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (SSS Form No. 110) to him. Such 10-day period may not be extended, except when the local board finds that the registrant was unable to file such request within such period because of circumstances over which he had no control."—32 C. F. R. § 1624.1(a), page 801.

Section 1624.2 of the Selective Service Regulations provides:

"*Appearance Before Local Board.*—(a) At the time and place fixed by the local board, the registrant may appear in person before the member or members of the local board designated for the purpose. The fact that he does appear shall be entered in the 'Minutes of Actions of Local Board and Appeal Board' on the Classification Questionnaire (SSS Form No. 100).

"(b) At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing, or, if oral, shall be summarized in writing and,

in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. The member or members of the local board before whom the registrant appears may impose such limitations upon the time which the registrant may have for his appearance as they deem necessary.

"(c) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board shall consider the new information which it receives and shall again classify the registrant in the same manner as if he had never before been classified.

"(d) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board, as soon as practicable after it again classifies the registrant, shall mail notice thereof on Notice of Classification (SSS Form No. 110) to the registrant and on Classification Advice (SSS Form No. 111) to the persons entitled to receive such notice or advice on an original classification under the provisions of section 1623.4 of this chapter.

"(e) Each such classification shall be followed by the same right of appeal as in the case of an original classification."—32 C. F. R. § 1624.2, page 802.

Section 1624.3 of the Selective Service Regulations provides:

"*Induction Postponed.*—A registrant shall not be inducted during the period afforded him to appear in person before a member or members of the local board, and if the registrant requests a personal appearance he shall not be inducted until 10 days after the Notice of Classification (SSS Form No. 110) is mailed to him by the local board,

as provided in paragraph (d) of section 1624.2." —32 C. F. R. § 1624.3, page 802.

Section 1626.25 of the Selective Service Regulations (32 C. F. R. § 1626.25 (1951 Rev.)) provides:

> *"Special Provisions When Appeal Involves Claim That Registrant Is a Conscientious Objector.*—(a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action:
>
> "(1) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to combatant training and service in the armed forces, but not conscientiously opposed to noncombatant training and service in the armed forces, the appeal board shall first determine whether or not such registrant is eligible for classification in a class lower than Class I-A-O. If the appeal board determines that such registrant is eligible for classification in a class lower than I-A-O, it shall classify the registrant in that class. If the appeal board determines that such registrant is not eligible for classification in a class lower than Class I-A-O, but is eligible for classification in Class I-A-O, it shall classify the registrant in that class.
>
> "(2) If the appeal board determines that such registrant is not eligible for classification in either a class lower than Class I-A-O or in Class I-A-O, the appeal board shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory

recommendation from the Department of Justice.

"(3) If the registrant claims that he is, by reason of religious training and belief, conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces, the appeal board shall first determine whether or not the registrant is eligible for classification in a class lower than Class I-O. If the appeal board finds that the registrant is not eligible for classification in a class lower than Class I-O, but does find that the registrant is eligible for classification in Class I-O, it shall place him in that class.

"(4) If the appeal board determines that such registrant is not entitled to classification in either a class lower than Class I-O or in Class I-O, it shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice.

"(b) No registrant's file shall be forwarded to the United States Attorney by any appeal board and any file so forwarded shall be returned, unless in the "Minutes of Action by Local Board and Appeal Board" on the Classification Questionnaire (SSS Form No. 100) the record shows and the letter of transmittal states that the appeal board reviewed the file and determined that the registrant should not be classified in either Class I-A-O or Class I-O under the circumstances set forth in subparagraphs (2) or (4) of paragraph (a) of this section.

"(c) The Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious ob-

jections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by his local board to perform for a period of twenty-four consecutive months civilian work contributing to the maintenance of the national health, safety, or interest. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

"(d) Upon receipt of the report of the Department of Justice, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendation of the Department of Justice. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant both the letter containing the recommendation of the Department of Justice and the report of the Hearing Officer of the Department of Justice."

Section 1626.26 of the Selective Service Regulations (32 C. F. R. § 1626.26 (1951 Rev.)) provides:

"*Decision of Appeal Board.*—(a) The appeal board shall classify the registrant, giving consideration to the various classes in the same manner in which the local board gives consideration thereto when it classifies a registrant, except that

an appeal board may not place a registrant in Class IV-F because of physical or mental disability unless the registrant has been found by the local board or the armed forces to be disqualified for any military service because of physical or mental disability.

"(b) Such classification of the registrant shall be final, except where an appeal to the President is taken; provided, that this shall not be construed as prohibiting a lacal board from changing the classification of a registrant in a proper case under the provisions of part 1625 of this chapter."

STATEMENT

The Facts

Petitioner was born February 7, 1930. [16a] He registered with Local Board No. 28, Reading, Pennsylvania. [16a-17a] On January 23, 1951, the local board mailed him a classification questionnaire, being Form 100. [16a] This was returned to the local board properly filled out on January 31, 1951. [16a] In the questionnaire petitioner indicated, on page 7, that he had conscientious objections to combatant and noncombatant military service. He signed the statement requesting that the special form for conscientious objector be mailed to him. [20a]

In the classification questionnaire petitioner showed that he worked at a hat factory. [20a] He also showed that he operated his father's farm of 116 acres, 30 acres of which were under cultivation. [19a] He showed that he had completed eight years of elementary schooling. [20a]

The local board mailed to the petitioner a special form for conscientious objector (SSS Form No. 150) on January 31, 1951. [21a, 23a] It was returned properly signed and filled out by the petitioner on February 5, 1951. [23a] Al-

though Series I(B) of the form (page 1) was not signed petitioner wrote on page 4 of the form as follows:

> "My training and belief in relation to a Supreme Being involves duties superior to those arising from any human relation. This prevents me from turning aside from those superior duties which I owe to a Superior Being.
>
> [signed] Philip A. Witmer
>
> "for section I (B)
> "page 1" [27a]

Under Series II of the special form for conscientious objector petitioner stated that he believed in a Supreme Being. He described the nature of his beliefs involving duties superior to those arising from any human relation by the following:

> "I am absolutely neutral toward the political disputes and the international controversies and combats of this world. I take no active or violent part for either side, but pay my vows to God and always advocate his kingdom and way of salvation." [24a]

Petitioner showed the source of his training and belief supporting his claim by stating that he had been instructed by his parents in the study of the Bible and that at the age of eleven he himself began to study the Bible with the aid of the Watchtower publications. [24a] He stated in the form that he believed in the use of force only at the command of Almighty God. [24a] He further stated that he had demonstrated his convictions by the study of the Bible and by telling others about God's Kingdom and "of how he will put a stop to all wars." [24a] He answered questions showing his general background, including schooling and employment. [24a-25a] He showed that he was an active member of Jehovah's Witnesses and acknowledged the Watchtower Bible

and Tract Society, Inc., of Brooklyn, New York, as the governing body of Jehovah's Witnesses. He stated that he had always been one of Jehovah's Witnesses. He gave references to the local meeting place and named the presiding minister, Richard Palms. Also he attached to the special form for conscientious objector the February 1, 1951, issue of the *Watchtower* magazine for a description of the official statement of Jehovah's Witnesses in relation to participation in war. He referred to this publication in his answers to Series IV 2(e). [25a-26a]

Petitioner also gave references and signed a certificate that he had truthfully answered all of the questions propounded in the form. [26a-27a]

Petitioner was classified 1-A (making him liable for unlimited military training and service) on February 21, 1951. [21a] On March 1, 1951, petitioner wrote a letter requesting a personal appearance, in which he also requested an appeal. [12a-13a, 27a-28a] The local board notified petitioner to appear before the board for a personal appearance on March 19, 1951. [27a]

At the trial in the court below a question was raised as to whether the request for personal appearance was within ten days as required by the regulations. The letter requesting personal appearance and appeal was written on March 1, 1951, mailed on that date but not received by the board until March 5, 1951, which was more than ten days from the date of classification. The reason for the delay in receiving the letter was due to the fact that the office of the board was not open on Saturday, March 3, and was closed on Sunday, the 4th as usual. The clerk found the letter at the office on arrival on the 5th. [11a-12a] Neither the court nor the local board held that the petitioner was too late in making the request. [11a, 53a]

Petitioner appeared on March 19, 1951. [4a, 5a, 9a-10a, 21a, 33a-34a, 53a-55a] He submitted new information verbally and also filed with the board a letter and an affidavit. [9a, 28a-29a, 29a-33a, 54a] The affidavit is by Richard B.

Palms, the presiding minister of the local congregation of Jehovah's Witnesses. It vouches for the sincerity of the petitioner and his membership in the organization known as Jehovah's Witnesses. [9a, 28a-29a, 53a] A typewritten statement attached to the affidavit, consisting of three pages, explained why petitioner felt that he was a minister of religion and entitled to classification as such. [9a, 29a-33a, 53a-54a] The local board made a memorandum of what transpired upon the occasion of the personal appearance. It was dictated by the chairman of the board. [7a, 10a, 33a-34a, 54a-55a] It reads as follows:

"March 19, 1951

"Re: Order #36-28-30-71 Philip Andrew Witmer

"The Board met with registrant today. The registrant informed the Board that he left his place of employment on March 3, where he had worked for three years in a hat factory. The Board chairman immediately pointed out that he was classified as 1-A on February 21, which meant he left his position about two weeks later. He then mentioned that his father had a farm which had not been worked as a farm for 23 years but that he felt he was going to start getting this farm in shape. Prior to this time he stated he had gotten a few acres in shape for their own family use so that they would not be dependent upon other people.

"The registrant then pointed out that he was a minister of the Gospel and the only evidence he presented to substantiate this fact was some paraphernalia from the Watchtower Association of the Jehovah Witness. The registrant was asked if he was an ordained minister and he said Jehovah Witnesses became ordained when they started distributing their literature. The Board felt this was not sufficient evidence to warrant a

4-D Classification and informed the registrant his case would be sent up to the Appeal Board following his physical examination." [33a-34a, 54a-55a]

There was considerable interrogation by counsel and the court as to what transpired upon the occasion of the personal appearance. The undisputed evidence developed at the trial establishes that petitioner was told that because he had requested an appeal no action would be taken upon his case, the classification would not be changed, no new classification card would be mailed and that the file would be forwarded to the appeal board. The board admittedly informed petitioner at the conclusion of the personal appearance that the case was out of their hands because he had appealed. [4a, 5a, 6a-7a, 8a, 10a, 13a]

The clerk of the local board testified that it was the policy of the board, when no new evidence was presented justifying a change of classification, not to notify the registrant by mailing a notice of classification and not to consider the classification anew, but automatically to send the file to the appeal board without further action. [4a, a-7a, 10a]

Following the personal appearance the file was sent to the appeal board. On April 24, 1951, the appeal board determined that petitioner should not be classified as a conscientious objector, either to combatant or noncombatant military service. In the same order the appeal board, as required by statute, ordered the entire file forwarded to the Department of Justice for an investigation and report to the appeal board on the validity of petitioner's claim for classification as a conscientious objector. This action is not referred to in the testimony. It appears in the draft board file. [21a, 34a-35a, 55a]

The report of the Federal Bureau of Investigation was that the grade school teacher informed that petitioner had a high character and thought that he was "a sincere objector." [37a] Members of petitioner's church reported that

he was active in the work of Jehovah's Witnesses and believed "him to be sincere." [37a] The employer of petitioner reported that petitioner was "very religious and very sincere in his beliefs." [37a] A fellow employee remembered him as being a very aggressive talker on religion and that he had heard him say "long ago that it is wrong to go to war." [37a] Petitioner's neighbors reported that the character of petitioner was good and that they thought his conscientious objector stand was made sincerely. [37a]

The facts stated by the hearing officer were that petitioner was one of Jehovah's Witnesses and that he signed Series XIV in the classification questionnaire showing that he was conscientiously opposed to participation in war, combatant and noncombatant. He refers to Form 150 submitted by petitioner where he took the position all of Jehovah's Witnesses take, that they were neutral in their attitude toward war by the worldly governments and their obligations to God were superior to any other obligation. [37a-38a] The hearing officer stated:

> "This position is a form of pacifism peculiar to this group. They say that they would fight at the Lord's command, but that there is now no such command to them. They say that the ancient Jews were justified in making war because Jehovah commanded them to. They claim to be ministers of the gospel and object to army service because it will interfere with their ministry. They usually refer also to the Christian obligation to love others and not to hate or harm them. The registrant says on this point: 'We believe in love and you are supposed to love everybody even your enemies'. This registrant's pacifism is based on all these considerations. His position is the same as that of many members of this group whom I heard during the war and who were classified 4E.
>
> "As to taking noncombatant service, he quotes

his old school teacher who used to say, the boy who makes the snow balls is just as responsible as the boy who throws them. . . .

"The registrant is evidently a life-long and rather active Jehovah's Witness. His desire to be deferred on other grounds does not seem to me to invalidate his claim to be regarded as a conscientious objector."

The hearing officer recommended in favor of petitioner's claim for classification as a conscientious objector, reporting:

"I recommend that the registrant be classified IV-E." [39a]

A. Devitt Vanech, Deputy Attorney General, on October 18, 1951, reviewed the file and the report of the hearing officer. [35a-36a] He rejected the recommendation of the hearing officer and recommended that petitioner's claim for exemption as a conscientious objector be not sustained:

"After consideration of the character and good faith of the objections of the registrant, the Department of Justice recommends to your Board that his claim for exemption from combatant and noncombatant training and service be not sustained.

"You will note that this Department does not concur in the recommendation of the Hearing Officer. January 30, 1951, while employed in a hat factory, registrant wrote a letter to the local board, in which he states: 'It is my ambition to become a farmer and devote all my time to farming. For this reason I am appealing to you to grant me an agricultural classification as I assure you that I will increase production year after year, and contribute a satisfactory amount for the war effort and civilian use.' In his letter to the

> local board dated March 1, 1951. registrant claims to be a minister of the Gospel. Registrant's inconsistent statements and his offer to contribute to the war effort are believed to be incompatible with a sincere conscientious objector claim." [36a]

The Deputy Attorney General added:

> "It is also noted that registrant did not sign series I (A) or (B) on SSS Form No. 150." [36a]

It should be observed that this comment by the Deputy Attorney General is without weight or moment in the consideration of the claim of petitioner as a conscientious objector because, as stated at page 14, *supra,* although petitioner did not sign the printed statement on page 1 of the special form for conscientious objector (SSS Form No. 150), he wrote out and signed a statement on page 4 of the special form which is identical to that appearing in the printed statement in series I (B). [27a]

On November 6, 1951, petitioner was notified of a I-A classification by the appeal board. [21a] This is shown by the appeal record that appears in the draft board file. [39a]

Petitioner was mailed a notice to report for induction. [21a, 44a] It was dated November 21, 1951. He was commanded to report and submit to induction on December 5, 1951. [44a]

Petitioner reported at the induction station but refused to submit to induction. [48a] He was taken out of the line-up and admonished if he did not submit to induction he would be prosecuted. He was offered noncombatant service in the armed forces as a conscientious objector, which he refused. He was again ordered to take one step forward when his name was called and he again refused to step forward and be inducted into the armed forces. [49a-50a] The army officers reported from the induction station back to the local board that petitioner was a conscientious objector, that he was one of Jehovah's Witnesses, and that because

of conscience and religion he could not enter military service "even in a noncombatant status." [48a, 49a-50a]

History of Action

This criminal action was started by indictment charging petitioner with violating the Selective Service Act of 1948, as amended, and the regulations thereunder, by failing to submit to induction. [1a, 3a] The indictment charged that the petitioner refused to be inducted into the armed forces of the United States after having been properly classified and ordered to report for induction by his local board. [1a, 3a] Petitioner was arraigned. He pleaded not guilty. [1a] There was a trial to the jury. [1a, 4a] The case was called for trial on Thursday, March 27, 1952, and was concluded on Monday, March 31, 1952. [1a, 4a, 15a] Evidence was received. [4a-16a]

The jury found the petitioner guilty. [1a] The court heard argument on the motion for acquittal and took the case under advisement. [1a] An opinion was written and an order entered denying the motion. [1a, 52a-59a] The court sentenced petitioner to serve three years in the custody of the Attorney General. [16a] Notice of appeal was duly and timely filed. [2a] The court below affirmed. [61-62] The petition for writ of certiorari is timely filed.

Rulings of the Court Raising Questions Involved

At the close of the Government's case in the district court the petitioner made a motion for judgment of acquittal and requested the court to instruct the jury to return a verdict. [7a-8a] This motion was renewed and additional grounds were urged after the verdict. [14a, 50a-52a] The court overruled both motions. [14a, 50a] An opinion was written. [52a-59a] Each question raised in this petition is supported by the motion for judgment of acquittal and was passed upon by the courts below. [50a-52a, 52a-59a, 61-62]

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred in holding that—

(1) The appeal board had basis in fact for the denial of the conscientious objector status;

(2) The recommendation of the Department of Justice that petitioner's willingness to aid the war effort by farming was basis in fact for the denial of the exemption from participation in the armed forces as a conscientious objector;

(3) Failure to give the petitioner a full and fair hearing on personal appearance by not reopening and reclassifying petitioner was not a denial of procedural due process of law;

(4) The judgment of the trial court should not be reversed but affirmed.

REASONS FOR GRANTING THE WRIT

I.

The first ground for granting certiorari is that here is presented a very important question of federal law which has not been, but which ought to be, determined by this Court. It is whether willingness on the part of the thousands of conscientious objectors to participate indirectly in the war effort by doing work on a farm forfeits their exemption from direct participation in the armed forces.

The courts below held that they could lose their conscientious objector status if they worked or were willing to work in a defense plant. [55a, 61] The petitioner says that, in the absence of an express authorization from Congress, the holding below was in error. The holding was judicial legislation rather than statutory construction.

The question is, therefore, very important because it involves the proper administration of the law by thousands of administrative officers affecting the rights of thousands of registrants throughout the entire United States. The case does not involve one person or one group of persons. But

the rights of all conscientious objectors in the United States to do work of their own choice and keep their exempt status is involved under the act and the regulations. The nation-wide effect and the large class of persons affected by the ruling make the question extraordinarily important so as to command a review and determination by this Court.

The hearing officer of the Department of Justice did not place great reliance on the fact that Witmer was employed on the farm. But the Assistant Attorney General in his recommendation to the appeal board gave consideration to this fact. Witmer said that his conscience was clear. Notwithstanding the type of work that he did, he was still conscientiously opposed to participation in war in the armed forces in any form.

Petitioner submits that the local board and the trial court have misinterpreted Section 6(j) of the act. The court below erroneously approved this. Congress never provided that the conscientious objections must be to "war in any form." (*Taffs* v. *United States*, 8th Cir., Dec. 7, 1953, 208 F. 2d 329 certiorari denied March 15, 1954, 347 U. S. 928) Congress did not hold that a conscientious objector who was not opposed to self-defense and employment in defense work was not a conscientious objector. It is direct participation in war in any form that is the subject matter of the statutory provision for the conscientious objector. Nothing whatever is said in the act or the regulations or in the legislative history that indicates anything to the effect that if a person is willing to do a certain type of work and indirectly participates in the war effort he cannot be considered a conscientious objector having conscientious scruples to direct participation in war in any form even though he was willing to indirectly participate by performing farm work as a means of employment. If the unreasonable interpretation placed upon the act by the trial court and the local board, which was adopted by the Court of Appeals, is accepted it will authorize an unending and uncontrollable forfeiture of bona fide conscientious objector claims. Every

type of work and act that may be conceivably thought of remotely and indirectly contributing to the war effort can be relied upon to deny the conscientious objector status. This is contrary to the intent of Congress.

Congress did not intend to allow an inquest to be held as to the kind of work that a registrant did or was willing to do. Congress intended to protect every person who had conscientious objections based upon religious grounds to direct participation in war in any form. Congress did not make the factors relied upon by the trial court and the local board, which were approved by the Court of Appeals, as any basis in fact for the denial of the conscientious objector claim.

Neither the act nor the regulations make work that a person does that indirecly contributes to the war effort a criterion to follow in the determination of his conscientious objections. The sole questions for determination of conscientious objection are: (1) does the person object to participation in the armed forces as a soldier? (2) does he believe in the Supreme Being? (3) does this belief carry with it obligations to God higher than those owed to the state? (4) does his belief originate from a belief in the Supreme Being and not from a political, sociological, philosophical or personal moral code?

Witmer's case commands affirmative answers to all these questions. He fits the statutory definition of a conscientious objector.

It is entirely irrelevant and immaterial for the courts below to hold that there was basis in fact because Witmer was willing to work on a farm. This was not an element to consider and in any event it was no basis in fact according to the law for the denial of his claim. It did not impeach or dispute in any way what he said in his questionnaire and conscientious objector form, all of which was corroborated by the FBI report.

The law does not authorize the Department of Justice and the courts below to invent fictitious and foreign stand-

ards and use them to speculate against evidence and facts that are undisputed.—*Dickinson* v. *United States*, 346 U. S. 389 (Nov. 30, 1953); *Schuman* v. *United States*, 9th Cir., Dec. 21, 1953, 208 F. 2d 801; *Annett* v. *United States*, 10th Cir., 1953, 205 F. 2d 689; *United States* v. *Alvies*, N. D. Cal. S. D., 112 F. Supp. 618; *United States* v. *Graham*, W. D. Ky., 109 F. Supp. 377; *United States* v. *Everngam*, D. W. Va., 102 F. Supp. 128; *Pine* v. *United States*, 4th Cir., April 5, 1954, 212 F. 2d 93; *Jessen* v. *United States*, 10th Cir., May 7, 1954, — F. 2d —; *United States* v. *Close*, 7th Cir., June 10, 1954, — F. 2d —.

The question of employment and work performed by one who claims to be a conscientious objector becomes material only when the type of work willing to be done by the conscientious objector is direct participation of a combatant or noncombatant nature.

The Congress of the United States in passing the Universal Military Training and Service Act provided for two kinds of conscientious objectors. One is a person who has objections only to the performance of combatant service. He is recognized as willing to wear a uniform and do anything in the armed forces except kill or carry a gun. This type of conscientious objector does not have his conscience questioned because of the type of work he is willing to perform even though it may be in the armed forces. No board or official of the government may deny a registrant his conscientious objector claim to the I-A-O classification (limited military service as a conscientious objector opposed to combatant military service only) because of his willingness to perform noncombatant service in the armed forces, thus helping the armed services do a job of killing.

It is submitted also that the conscientious objector to both combatant and noncombatant military service ought not be denied his conscientious objector classification because of the kind of work he is doing outside the armed services that indirectly contributes to the war effort. The law disqualifies no one on such ground. A reasonable inter-

pretation of the act and the regulations would not make the type of employment that a registrant is willing to do relevant so long as it does not involve direct participation in combatant or noncombatant military service.

The tremendous importance of the question here discussed is best illustrated by a showing of how far the holding of the courts below, when given its logical extension, pushes conscientious objectors out from under the protection of the law. Should this interpretation of the statute be accepted as the law then an unreviewable engine of speculation, forfeiture and discrimination has been placed in the hands of the administrators of the law. They can forfeit the conscientious objector claim for the willingness of the conscientious objector to do anything the draft boards or the Department of Justice finds to contribute remotely to the war effort or which may be considered indirect participation. If such an interpretation be accepted then a conscientious objector who farms and produces food ultimately used by the army, or who works on a railroad that carries troops or implements of warfare, or who pays his income taxes—over half of which is used to finance the armed forces and the defense effort of the nation—will be denied his exemption from direct participation in the armed forces. Then at last a ready device for evading the holding of this Court in *Dickinson* v. *United States,* 346 U. S. 389 (Nov. 30, 1954), has been found.

There are no other opinions discussing this question (except that of the trial court in this case) known to counsel for petitioner. The question was involved (but not discussed) in *Clark* v. *United States,* 74 S. Ct. 357, 98 L. Ed. 171 Mr. Justice Douglas said: "According to the papers before me he indicated that he was by religious training and belief opposed to participation in war but that he was willing to use force in defense of his family or his congregation and that he would work in a defense plant if in great economic need." He held that a substantial question was involved upon the appeal so as to permit bail.

The strict construction of the act advocated by the Government and the court below was not intended by Congress; Congress had in mind a liberal interpretation of its provision for conscientious objectors to protect the religious objector. The records of the hearings in Congress, the reports and the act all prove a broad exemption was intended. Congress had in mind that objection to war is a part of the religious history of this country. Conscientious objection was recognized by Massachusetts in 1661, by Rhode Island in 1673 and by Pennsylvania in 1757. It became part of the laws of the colonies and states throughout American history. It finally became part of the national fabric during the Civil War and has grown in breadth and meaning ever since. (See Selective Service System, *Conscientious Objection,* Special Monograph No. 11, Vol. I, pp. 29-66, Washington, Government Printing Office, 1950.) So strongly was the principle of conscientious objection imbedded in American principles that President Lincoln and his Secretary of War thought that conscientious objectors had to be recognized. This is impressed upon us by Special Monograph No. 11, Vol. I, *supra,* at page 43: "At the end of hostilities Secretary of War Stanton said that President Lincoln and he had 'felt that unless we recognize conscientious religious scruples, we could not expect the blessing of Heaven.'"

As appears above, the Selective Service System in Special Monograph No. 11, Vol. I, carries the history far back, even before the American Revolution (*Ibid.,* pages 29-35) Virginia and Maryland exempted the Quakers from service. (*Ibid.,* page 37) From the Revolution to the Civil War provision for exemption of conscientious objectors appears in the state constitutions. During the Civil War the military provost marshal was authorized to grant special benefits to noncombatants under Section 17 of the act, approved February 24, 1864. Lincoln was urged to force conscientious objectors into the army. He replied:

"No, I will not do that. These people do not

> believe in war. People who do not believe in war make poor soldiers. . . . These people are largely a rural people, sturdy and honest. They are excellent farmers. *The country needs good farmers fully as much as it needs good soldiers. We will leave them on their farms where they are at home and where they will make their contributions better than they would with a gun."—Ibid.*, pages 42-43, italics added.

Congress certainly must have had in mind the historic national policy of fair treatment to conscientious objectors. The well-known governmental sympathy toward the Quakers and others was not ignored by Congress when the act was passed. Congress must have had in mind the historic considerations enumerated by the Supreme Court in *Girouard* v. *United States*, 328 U. S. 61. Read 328 U. S., at pp. 68-69.

The recommendation of the Department of Justice is advisory and may be rejected by the appeal board. This does not mean that illegal recommendations are harmless. When the recommendation is not rejected but the advice is followed then it becomes a link in the chain of administrative proceedings. A break in this link of the chain destroys the proceedings.—*United States* v. *Everngam*, D. W. Va. 1951, 102 F. Supp. 128; *United States* v. *Bouziden*, W. D. Okla., 1952, 108 F. Supp. 395.

The adoption and following of erroneous advice from the Department of Justice by the appeal board makes invalid the final classification. *Annett* v. *United States*, 10th Cir., 1953, 205 F. 2d 689; *Taffs* v. *United States*, 8th Cir., Dec. 7, 1953, 208 F. 2d 329; *Jessen* v. *United States*, 10th Cir., May 7, 1954, — F. 2d —; *United States* v. *Close*, 7th Cir., June 10, 1954, — F. 2d —. It cannot be argued, therefore, that the illegal recommendation did no harm. It has been held that where there is an illegal recommendation by the Department of Justice and the evidence shows that the

registrant is a conscientious objector it must be concluded that the only reason for a denial of the conscientious objector claim is the illegal recommendation which makes the classification illegal.—*United States* v. *Close*, 7th Cir., June 10, 1954, — F. 2d —.

It is submitted that there is presented here an important and substantial question of law that has not been decided by this Court but which ought to be determined by this Court. This is a sufficient ground for granting certiorari.

II.

The undisputed documentary evidence in the file before the appeal board showed that the petitioner was conscientiously opposed to participation in combatant and noncombatant military service. He showed: (1) he believed in the Supreme Being, (2) he was opposed to participation in combatant and noncombatant military service, (3) he based his belief and opposition to service on religious training and belief as one of Jehovah's Witnesses, (4) such stand did not spring from political, sociological or philosophical beliefs. This showing brought him squarely within the statute and the regulation providing for classification as a conscientious objector. This entitled him to exemption from combatant and noncombatant military training and service.

It has been held by many courts of appeal that the rule laid down in *Dickinson* v. *United States*, 346 U. S. 389, holding that if there is no contradiction of the documentary evidence showing exemption as a minister that there is no basis in fact for the classification also applies in cases involving claims for classification as conscientious objectors. —*Weaver* v. *United States*, 8th Cir., Feb. 19, 1954, 210 F. 2d 815; *Taffs* v. *United States*, 8th Cir., Dec. 7, 1953, 208 F. 2d 329; *United States* v. *Hartman*, 2d Cir., Jan. 8, 1954, 209 F. 2d 366; *Pine* v. *United States*, 4th Cir., April 5, 1954, 212 F. 2d 93; *Jewell* v. *United States*, 6th Cir., Dec. 22, 1953, 208 F. 2d 770; *Schuman* v. *United States*, 9th Cir., Dec. 21, 1953,

208 F. 2d 801; *Jessen* v. *United States*, 10th Cir., May 7, 1954, — F. 2d —; *United States* v. *Close*, 7th Cir., June 10, 1954, — F. 2d —.

Recently in *Jessen* v. *United States*, 10th Cir., May 7, 1954, — F. 2d —, after quoting from *Dickinson* v. *United States*, 346 U. S. 389, the court said:

> "Here, the uncontroverted evidence supported the registrant's claim that he was opposed to participation in war in any form. There was a complete absence of any impeaching or contradictory evidence. It follows that the classification made by the State Appeal Board was a nullity and that Jessen violated no law in refusing to submit to induction."

The decision of the court below is in direct conflict with the holdings in other cases decided by other courts of appeal. In those cases the appellants, like petitioner here, were Jehovah's Witnesses. They showed the same religious belief, the same objection to service and the same religious training. While different speculations were relied upon by the Government which were discussed and rejected by the courts in those cases, the courts were also called upon to say, on facts identical to the facts in this case, whether there was basis in fact. For instance, see *Jessen* where the Tenth Circuit (after following *Taffs* v. *United States*, 8th Cir., Dec. 7, 1953, 208 F. 2d 329) said: "The remaining question is whether there was any basis in fact for the classification made by the State Appeal Board."

The holdings of other circuits with which the holding of the court below (that there was basis in fact for the denial of the classification) directly conflicts are: *Annett* v. *United States*, 10th Cir., June 26, 1953, 205 F. 2d 689; *United States* v. *Pekarski*, 2d Cir., Oct. 23, 1953, 207 F. 2d 930; *Taffs* v. *United States*, 8th Cir., Dec. 7, 1953, 208 F. 2d 329; *Jewell* v. *United States*, 6th Cir., Dec. 22, 1953, 208 F. 2d 770; *Schuman* v. *United States*, 9th Cir., Dec. 21, 1953, 208 F. 2d

801; *United States* v. *Hartman*, 2d Cir., Jan. 8, 1954, 209 F. 2d 366; *Pine* v. *United States*, 4th Cir., April 5, 1954, 212 F. 2d 93; *Jessen* v. *United States*, 10th Cir., May 7, 1954, — F. 2d —; *United States* v. *Close*, 7th Cir., June 10, 1954, — F. 2d —. And these cases ought not to be pushed aside on the specious but factitious ground that, because the courts in some of those cases discussed the speculations urged on the courts as basis in fact, the cases are different. They are not different because on the question of whether or not there was basis in fact the evidence in each case is identical to the facts in this case and the holdings were the opposite to that made by the court below in this case. Such attempted distinction would be a distinction without a difference. The cases above cited are identical to the facts in this case insofar as the statements in the draft board record showing conscientious objection is concerned.

It is submitted, therefore, that there is a direct conflict between the holding of the court below and the holding of other courts of appeals on this question. This gives a basis for granting the writ of certiorari.

III.

The decision in this case by the court below conflicts with its earlier decision in *United States* v. *Stiles*, 3rd Cir., 1948, 169 F. 2d 455. The single narrow question involved in the *Stiles* decision was "whether under Selective Service Regulations a local board is required to classify a registrant anew after his personal appearance before the board even though he presents no new information to the board when he appears before it." This language is taken from the *Stiles* opinion. The court went on to hold that "the furnishing of new information" is not made "a condition precedent to such classification anew and it thus appears that it is to be done after reconsideration of the information already in the file in the light of the registrant's oral discussion of it and of his claim for reclassification even though he has furnished no new information."

The entire court below in its opinion ignores completely the importance of the maintenance of procedural due process of law in Selective Service cases. It should be remembered that the scope of review in Selective Service cases as far as the classification is concerned is limited and restricted. (*Estep* v. *United States*, 327 U. S. 114) The rule of administrative law is that in cases where the review is restricted there must be a strict compliance with the requirements of procedural due process by the administrative agency.—See *N. L. R. B.* v. *Cherry Cotton Mills*, 5th Cir., 1938, 98 F. 2d 444, 446.

It has been uniformly held that for the final order to report for induction to be valid in Selective Service cases it must appear that the local board has strictly complied with the procedural requirements of due process of law. —*Ver Menren* v. *Sirmyer*, 8th Cir., 36 F. 2d 876, 881; *United States* v. *Zieber*, 3rd Cir., 161 F. 2d 90, 92; Ex parte *Fabiani*, E. D. Pa. 105 F. Supp. 139; *United States* v. *Graham*, N. D. N. Y., 108 F. Supp. 794; *Bejelis* v. *United States*, 6th Cir., 206 F. 2d 354.

In *United States* v. *Hufford*, M. D. Pa., 103 F. Supp. 859, 861 the district court below said:

> "If the board did not fully and fairly comply with the provisions of the Act and the applicable regulations, the registrant was under no duty to comply with the order."

The effort on the part of the court below to simulate this case to *Martin* v. *United States*, 4th Cir., 190 F. 2d 775, and to distinguish it from the holding in *United States* v. *Stiles*, 3rd Cir., 169 F. 2d 455, proceeds on a fundamentally erroneous basis.

The entire basis of the decision below can be briefly stated. It is: Witmer had notice of what took place upon the occasion of the personal appearance. Because he had actual notice of the proceedings there was a waiver of the

violations of the law by the local board and Witmer cannot now complain about these violations.

The undisputed evidence shows that the local board defiantly refused to reopen the case and consider it entirely anew. The local board merely stated that the new evidence did not show Witmer was entitled to the ministerial exemption. The board then refused to reopen, declaring that the original classification stood. This was not a *de novo* consideration of the case. Admittedly is no evidence in the record that the case was reopened as required by section 1624.2(b) and (c) of the regulations. The record shows to the contrary. The court held that because the board considered the IV-D claim there was a *de novo* consideration. Nowhere in the record does it appear that the local board reopened the entire case. Nowhere does it appear that on the personal appearance the local board considered the conscientious objector form. Nowhere in the record does it appear that the local board considered the farmer's classification. The only claim that was mentioned was the minister's claim, but even then the very memorandum in which it is mentioned shows that the board did not reopen the old classification, as it was required to do. It merely ordered the old original classification to stand without any reclassification as required by Section 1624.2(c) of the regulations.

It is obvious that the local board defiantly violated Section 1624.2(c), refused to conduct a *de novo* hearing upon the personal appearance and refused to consider all the claims for classification and reclassify Witmer "in the same manner as if he had never before been classified" as required by Section 1624.2(c).

The court below merely held that because Witmer was given actual notice of this procedural violation of his rights by the local board, this was equivalent to the legal notice of legal procedure required by Section 1624.2(c). Actual notice of the illegal refusal to reopen the case and reclassify Witmer was not notice of reclassification on personal ap-

pearance required by Section 1624.2(d). That section of the regulations says that the board shall mail the registrant notice of classification. Since there was no reclassification upon personal appearance the giving of actual notice of the determination of the local board not to reopen cannot be argued or found to be "Notice of Classification" required by Section 1624.2(d).

In order for the notice of action by the local board to be good and legal, the action taken by the local board upon personal appearance must be legal action itself. There must be a reopening of the classification and a reclassification after a reopening, the same as though the registrant "had never before been classified," as required by Section 1624.2-(c) of the regulations. Illegal action and notice of such illegal action are not equivalent to the legal action required by the regulations and notice of such action.

Actual notice, even though not in writing, of proper legal action makes harmless the failure to give written notice required by the regulations. (*Martin* v. *United States,* 4th Cir., 190 F. 2d 775) But where there is illegal action the actual notice thereof does not make the illegal action legal or validate the invalid proceedings.

If the holding of the court below is to be accepted, then it will be the end of procedural due process of law. A tribunal could deny procedural due process upon a hearing and then notify a party of such illegal denial. According to the court below the giving of actual notice of such denial of procedural due process constitutes a waiver of it. This extreme position taken by the court below the law of the land rejects. The position of the court below in this case is subversive of the maintenance of due process of law and standards of strict compliance with the procedural requirements of law.

The court below relies upon *Martin* v. *United States,* 4th Cir., 190 F. 2d 775, and *Atkins* v. *United States,* 10th Cir., 204 F. 2d 269. As has been demonstrated in the main brief the facts in both of those cases show an entirely dif-

ferent situation from the facts that exist in this case on the personal appearance. In both of those cases the only claim made by the registrant was the ministerial claim. No conscientious objector claim was made. There was no other claim for classification made. When the boards considered only the ministerial claim in the *Martin* and *Atkins* cases they considered the entire case. Here, however, there was more involved in the case than the ministerial claim. It was the duty and responsibility of the board to pass upon the conscientious objector claim and the farmer claim. Neither of these claims was passed upon or considered. Moreover the *Martin* and *Atkins* cases are distinguishable for other reasons. It appears from the opinions of the courts in both of those decisions that each local board did actually reopen the case and reconsider the classification entirely anew. Martin was actually reclassified on the personal appearance and placed in Class 1-A. Atkins, while not reclassified, was notified that his claim for exemption as a minister had been denied and that the old classification would be continued. Therefore there was an actual reopening of the cases by the local boards. But such was not done in this case. Therefore the doctrine of *United States* v. *Stiles,* 3rd Cir., 169 F. 2d 455, applies here and should be enforced rather than the rule of *Martin* v. *United States,* 4th Cir., 190 F. 2d 775.

The conduct of the local board here is more reprehensible than that of the local board that was condemned in *United States* v. *Strebel,* D. Kans., 103 F. Supp. 628. There on personal appearance of the registrant the local board reopened the classification but merely determined upon the personal appearance that they would let the old classification drift along. Even this type of action upon the personal appearance was condemned. Here the misconduct of the local board is the same as that condemned in *United States* v. *Graham,* N. D. N. Y., 108 F. Supp. 794.

The Government makes an extensive argument that Witmer waived his rights to complain about the denial of a full and fair hearing upon the personal appearance and

the failure of the local board to follow the regulations. It is argued that the hearing that was conducted by the Department of Justice upon the conscientious objector claim completely satisfied the requirements of due process of law. This argument has been fully rejected by this Court in *United States* v. *Zieber,* 161 F. 2d 90, 92.—See also *United States* v. *Fry,* 2d Cir., 203 F. 2d 638; *United States* v. *Romano,* S. D. N. Y., 103 F. Supp. 597; *United States* v. *Laier,* N. D. Cal. S. D., 52 F. Supp. 392.

The regulation relied upon by the petitioner that requires a *de novo* consideration and a reopening of the case was repealed on September 25, 1951. This was after the hearing on personal appearance in this case. See Executive Order No. 10292. This is not, however, any reason for not granting the writ of certiorari. This Court has granted certiorari even where the law has, as here, been changed and it was clear that the issue would not arise again. —*Helvering* v. *New York Trust Co.,* 292 U. S. 455; *Cohn* v. *United States,* 297 U. S. 691.

It is submitted, therefore, that the question is of such great importance that the writ of certiorari should be granted so that it can be finally determined by this Court.

CONCLUSION

For the reasons above stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

HAYDEN C. COVINGTON

124 Columbia Heights
Brooklyn 1, New York

Counsel for Petitioner

June, 1954.

APPENDIX

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 11,189

UNITED STATES OF AMERICA

v.

WILLARD ROGER HAGAMAN,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Argued February 2, 1954
Reargued March 19, 1954

Before BIGGS, *Chief Judge*, and MARIS, GOODRICH, MCLAUGHLIN, KALODNER, STALEY and HASTIE, *Circuit Judges*.

OPINION OF THE COURT

(Filed May 13, 1954)

By HASTIE, *Circuit Judge*.

This is an appeal from a conviction for failing and refusing to be inducted into the armed forces of the United

States after being ordered to do so.[1] There is no doubt that the appellant, Hagaman, refused to be inducted into the armed forces. The defense to the criminal prosecution is that he was not obliged to obey the order to report and be inducted because the order was predicated upon Selective Service classification so improper that a court, acting within judicial province as defined in *Estep* v. *United States*, 1946, 327 U. S. 114, should declare it invalid.

Hagaman makes three distinct contentions: first, that the local board failed to follow prescribed procedure; second, that his claim to deferment as a minister of religion was rejected arbitrarily; and third, that the National Appeal Board had no basis for action it took changing his 1-O classification to 1-A.

All of us agree that the first and second contentions are without merit. The reasons for that conclusion appear in the opinion of Judge Goodrich. However, it is the decision of the court that appellant's third contention is sound and, therefore, that the conviction cannot be sustained.

This is the reasoning on the decisive third point which seems sound to a majority of the court. The registrant, claiming to be both a minister of religion and a conscientious objector, appealed to his district board from his local board's order placing him in class 1-A. On that appeal, in accordance with established procedure, the file was referred to the Department of Justice for advisory opinion. Honorable Curtis Bok, sitting as hearing officer for the Eastern District of Pennsylvania, then heard the registrant and filed his report and recommendation expressing his strong and complete conviction that the young man was sincere and was entitled at least to a conscientious objector classification. The Department of Justice so recommended and

[1] "[A]ny person who . . . evades or refuses registration or service in the armed forces . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . ." 50 U. S. C. A. App. § 462(a).

the five member district board by unanimous vote so decided, classifying the registrant 1-O.

Thereafter, the registrant, still believing that he was entitled to the additional exemption of a minister, caused the Director of Selective Service to appeal the 1-O conscientious objector classification, thus placing the whole matter before the National Appeal Board for reconsideration. That board, by a two to one vote, without stating any reason, and apparently without any additional evidence, not only denied the ministerial classification but revoked the conscientious objector classification and placed the registrant in class 1-A.

Thus, the present attack upon registrant's classification does not raise the question whether the local board had any justification for the initial 1-A classification,—and we do not suggest that it did—but rather whether the national board had any allowable basis for replacing the 1-O classification put into effect by the district board with its own 1-A classification. This distinction is important because the national board, very much like the court in this proceeding, seems merely to have reviewed the record made below, while the district board had made its 1-O classification on the basis of new matter, a report of a *de novo* hearing before an examiner and the resulting recommendation of the Department of Justice,[2] in addition to the local board file.

Upon what did he national board predicate its decision? We can look at the record and see what the considerations must have been for and against the claim of ministerial exemption. But the record does not disclose what it was that moved the national board to change the 1-O classification to 1-A. There certainly was very obvious basis in the record for the district board's action in classifying registrant as a conscientious objector. We are left

[2] A regulation requires the Board to "consider" the report and recommendation of the Department of Justice. 32 C. F. R. § 1626.25(c).

to speculate why the national board refused to accept that showing.

The Court of Appeals for the Sixth Circuit disposed of a record very much like this one by saying merely that, since there was no evidence contradicting the registrant's claim or inconsistent with his actual classification as a conscientious objector, and the national board acted merely on the file without taking testimony, the reclassification from 1-O to 1-A "was arbitrary and capricious, and without basis in fact." *Jewell* v. *United States*, 6 Cir. 1953, 208 F. 2d 770; *cf. United States* v. *Alvies*, N. D. Cal. 1953, 112 F. Supp. 618. Even more recently the Court of Appeals for the Fourth Circuit has disposed of such a record by saying "An examination of the file shows that there is nothing therein contradictory of the facts stated in the . . . [report and] recommendation [of the Department of Justice] and nothing upon which appellant could be denied his claim of exemption as a conscientious objector. The order giving him the classification 1-A, having no support in the record, is therefore void." *Pine* v. *United States*, No. 6720, decided April 5, 1954. In a somewhat similar situation the Court of Appeals for the Second Circuit reversed a denial of habeas corpus and remanded the case to the district court to determine as a fact the basis upon which the conscientious objection claim had been rejected. *United States* ex rel. *Reel* v. *Badt*, 2 Cir. 1944, 141 F. 2d 845.

In the case last cited the court indicated that such agencies as these boards should make their processes "sufficiently explicit to reveal so far as may be reasonably practicable, whether or not they are keeping within the statute under which they purport to act". 141 F. 2d at 848. Of course such disclosure need not be technical or elaborate. And it is not necessary at all in the usual case where the issue in controversy and the basis of decision are made apparent by the record itself. But in cases like the one now before us, the reclassifying board should indicate in a general and non-technical way it changed the classification.

However, we are reluctant to reverse on this procedural deficiency, if there is any satisfactory way of reaching the merits of the case. For that reason we have searched the record for possible bases of reclassification, though none has been made explicit or even inferentially clear. We find just two possibilities. The board may have thought that as a matter of law the showing made did not meet the statutory requirements for classification as a conscientious objector.[3] Or it may have disbelieved the registrant's testimony as to his convictions about participation in war.

We are inclined to believe that the national board proceeded on the first ground, taking the position that as a matter of law Jehovah's Witnesses are not conscientious objectors. This impression is based in large part upon the fact that in recent months Courts of Appeal have had to consider a whole series of rather similar cases where unexplained orders of the national board changing the classification of Jehovah's Witnesses from 1-O to 1-A make sense only if they represent a consistent administrative application of this understandable, if mistaken, legal theory. *Pine* v. *United States,* 4 Cir. 1954, *supra; Jewell* v. *United States,* 6 Cir. 1953, *supra; United States* v. *Hartman,* 2 Cir. 1954, 209 F. 2d 366; *cf. Taffs* v. *United States,* 8 Cir. 1953, 208 F. 2d 329, *cert. den.* 1954, 347 U. S. 928. Indeed, the government urged this legal point in its brief on the present appeal. It was pointed out that the registrant as one of Jehovah's Witnesses predicates his opposition to war on the tenets of the Watchtower Bible and Tract Society. Admittedly, that religious organization disapproves international war but sanctions "theocratic war". Hence, it was contended that Jehovah's Witnesses are not taught opposition "to participation in war in any form." But on oral argument in this case that contention was abandoned in the

[3] Section 6(j) of the Universal Military Training and Service Act exempts from combatant training and service a registrant "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." 50 U. S. C. App. § 456(j).

light of impressive decisions against the government on the very point since Hagaman's conviction. *Taffs* v. *United States, supra; United States* v. *Hartman, supra.* Thus, it is now conceded that the national board was wrong if it reclassified the registrant on the theory that his professed creed would not sustain a claim of conscientious objection to war.

But what if, apart from this legal question, the national board did not believe the registrant was sincere in his professions? Was the national board entitled, on the paper record alone, thus to discredit and reject the registrant's proof which had been so convincing to the hearing officer and the district board? *Jewell* v. *United States, supra,* and *Pine* v. *United States, supra,* both strike down such action as arbitrary. But here the government argues that such disbelief of the registrant might properly have been based on the fact that this young man, one of whose parents was a Jehovah's Witness, had not himself embraced that faith until he was seventeen years old at a time just three months before he registered for Selective Service. However, such rejection of testimony would have reflected the antithesis of the normal and proper unwillingness of a reviewing agency, which has not heard a witness, to reverse a judgment as to his credibility. Beyond that, it is a striking example of the very type of refusal to credit the evidence on the basis of suspicion and speculation, no conflict appearing on the face of the record, which the Supreme Court disapproved very recently in *Dickinson* v. *United States,* 1953, 346 U. S. 389. It does not matter whether we accept the statement of the majority in the *Dickinson* case, that ". . . the courts may properly insist that there be some proof that is incompatible with the registrant's proof of exemption", or the complaint of the dissenters, that "Under today's decision, it is not sufficient that the board disbelieve the registrant. The board must find and record affirmative evidence that he has misrepresented his case . . ." 346 U. S. at 396, 399. Under either formulation we would have

to assume that the national board here did just what the Supreme Court disapproved, and, different from the *Dickinson* case, in the face of the strong contrary conviction of the district board as well as the hearing officer before whom the registrant had appeared. In these circumstances, the classification cannot stand on the possibility that the national board was unwilling to credit the registrant's testimony as to conscientious objection to participation in war.

In *United States* ex rel. *Reel* v. *Badt, supra,* the Court of Appeals for the Second Circuit sent the case back to the district court for a further hearing because on the record it could only speculate whether the classification was made on a lawful or an unlawful basis. Here, we are satisfied that neither of the possible bases was proper. The 1-O classification was changed to 1-A either on a theory which the government now concedes to be legally wrong, or by an arbitrary decision on the facts. The reclassification was invalid and induction could not lawfully be required.

The judgment will be reversed.

GOODRICH, *Circuit Judge,* dissenting in part.

While this opinion is termed a dissent, the first two points discussed represent the opinion of all the members of the Court. They are: (1) Procedural due process; (2) The refusal to classify Hagaman as a minister of religion. The dissent by the minority comes upon the conscientious objector point discussed in Judge Hastie's opinion, which is joined in by enough of his colleagues to constitute a majority of the Court.

We turn to the procedural point first. Hagaman says he was denied procedural due process. After the filing of his questionnaire he received from his local Board a classification of 1-A. He requested a personal interview, to which

he was entitled under the regulations.[1] He had a personal interview. The Board heard him fully. Then he was told orally that his classification would not be changed and that he could appeal.[2] He did appeal; in fact his appeal went to the highest administrative authority, the National Selective Service Appeal Board.

The basis for Hagaman's complaint is that the local Board did not formally "reclassify" him after the personal interview as the regulations require. It is true that the regulations at the time of the events here did provide both for a formal reclassification and notification by mail.[3] It is also true that courts of appeals have reversed convictions of registrants when their rights were prejudiced by failure of notification. *United States* v. *Stiles*, 169 F. 2d 455 (C. A. 3, 1948), explaining *United States* v. *Zieber*, 161 F. 2d 90 (C. A. 3, 1947); *United States* v. *Fry*, 203 F. 2d 638 (C. A. 2, 1953).

It is one thing, however, to protect a man when he is prejudiced by the failure of administrative authorities to observe the precautions taken to guard his rights. It is an-

[1] "*Opportunity to appear in person.* (a) Every registrant, after his classification is determined by the local board . . . shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (SSS Form No. 110) to him." 32 Code Fed. Regs. § 1624.1 (1949). Substantially the same provision appears in the present regulation, 32 Code Fed. Regs. § 1624.1(a) (1951).

[2] The Board's minutes state: "Registrant told he would remain 1-A and case not reopened." On the same day as this hearing, the Board for the second time sent Hagaman a Notice of Classification as 1-A.

[3] "(c) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board shall consider the new information which it receives and shall again classify the registrant in the same manner as if he had never before been classified.

"(d) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board, as soon as practicable after it again classifies the registrant, shall mail notice thereof on Notice of Classification (SSS Form No. 110) to the registrant and on Classification Advice (SSS Form No. 111) to the persons entitled to receive such notice or advice on an original classification under the provisions of section 1623.4 of this chapter." 32 Code Fed. Regs. § 1624.2 (1949).

other thing to create an administrative procedure, designed to be handled by volunteer laymen in communities throughout the nation, as technical and ritualistic as common law pleadings. We have said in an earlier opinion that a registrant is not obliged to make his points with his draft board in the fashion required of a well-trained lawyer, *United States* ex rel. *Berman* v. *Craig*, 207 F. 2d 888 (C. A. 3, 1953). It is likewise true that the board's proceedings do not need to be recorded with the meticulous accuracy with which an experienced corporation counsel draws a set of corporate minutes.

The present case is like *Martin* v. *United States*, 190 F. 2d 775 (C. A. 4, 1951), followed in *Atkins* v. *United States*, 204 F. 2d 269 (C. A. 10, 1953) in which the court refused to "quibble over terminology."

The course of decision on this matter has been a commendable one. If a registrant has been denied a chance to exercise rights given him under the statute and regulations his conviction has been reversed, as in the *Zieber*, *Stiles*, and *Fry* cases, cited above. On the other hand, as in the *Martin* and *Atkins* cases, where there has been substantial compliance, so that a man has had all the consideration due him, the courts have refused to reverse for mere technical irregularities. That, we believe, works substantial justice.[4]

We pass, therefore, to appellant's complaint that there is no support in the record for the classification given him. Since *Estep* v. *United States*, 327 U. S. 114 (1946), we are bound to make this inquiry, and if there is no basis in fact

[4] Under the present regulations, the board need not reclassify the registrant in the absence of new information justifying such a change. "(c) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board shall consider the new information which it receives and, if the local baord determines that such new information justifies a change in the registrant's classification, the local board shall reopen and classify the registrant anew. If the local board determines that such new information does not justify a change in the registrant's classification, it shall not reopen the registrant's classification." 32 Code Fed. Regs. § 1624.2 (1951). However, the notification requirement remains the same. See 32 Code Fed. Regs. § 1624.2(d).

for the classification we must reverse the conviction. *Dickinson* v. *United States*, 346 U. S. 389 (1953); *Annett* v. *United States*, 205 F. 2d 689 (C. A. 10, 1953); *United States* v. *Pekarski*, 207 F. 2d 930 (C. A. 2, 1953); *Taffs* v. *United States*, 208 F. 2d 329 (C. A. 8, 1953), cert. denied, 347 U. S. 928 (1954); *Schuman* v. *United States*, 208 F. 2d 801 (C. A. 9, 1953); *Jewell* v. *United States*, 208 F. 2d 770 (C. A. 6, 1953); *United States* v. *Hartman*, 209 F. 2d 366 (C. A. 2, 1954); *United States* v. *Kobil* (E. D. Mich. 1951) (unreported); Ex parte *Fabiani*, 105 F. Supp. 139 (E. D. Pa. 1952); *United States* v. *Graham*, 109 F. Supp. 377 (W. D. Ky. 1952); *United States* v. *Alvies*, 112 F. Supp. 618 (N. D. Cal. 1953); *United States* v. *Loupe* (D. N. J. 1953) (unreported); *United States* v. *Burnett*, 115 F. Supp. 141 (W. D. Mo. 1953); *United States* v. *Lowman*, 117 F. Supp. 595 (W. D. N. Y. 1954); *United States* v. *Benzing*, 117 F. Supp. 598 (W. D. N. Y. 1954).

We start then with the task "to search the record for some affirmative evidence to support the local board's overt or implicit finding that a registrant has not painted a complete or accurate picture of his activities." *Dickinson* v. *United States*, *supra*, at 396.

We consider first the matter of Hagaman's claim to be classified as a minister of religion and, therefore, exempt from the draft under 50 U. S. C. A. App. § 456(g). It is settled that merely because he belongs to the body known as Jehovah's Witnesses, all of whose members claim to be ministers to preach the gospel to all the nations, he does not thereby become entitled to the ministerial exemption under the statute and regulations. *Dickinson* v. *United States*, *supra*, at 394; *Cox* v. *United States*, 332 U. S. 442, 449-450 (1947). The ministerial exemption is a narrow one and

has been rather fully described in the statute.[5] The burden is on the registrant to show that he comes within it. *Dickinson* v. *United States*, *supra*, at 395.

The administrative authorities were justified in finding that Hagaman did not so qualify. It is true that he was baptized at the age of eighteen into the "ministry" of this sect. And he claims to have been a minister from June, 1948, when he joined Jehovah's Witnesses. Of course, this is simply the claim all members make and, as said above, we must go further to find that he was a minister in the statutory sense. If, as pointed out in the *Dickinson* case, the flock is not to be left without a shepherd, it is equally true that the flock cannot consist of shepherds only.

When Hagaman was asked in the special form for conscientious objectors to name "the pastor or leader of such church, congregation, or meeting" he answered that it was one P. L. Talarico, who was the "company servant" for

[5] "(1) The term 'duly ordained minister of religion' means a person who has been ordained, in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.

"(2) The term 'regular minister of religion' means one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister.

"(3) The term 'regular or duly ordained minister of religion' does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization." 50 U. S. C. A. App. § 466(g).

this particular group in Fort Lauderdale, Florida.[6] Hagaman shows some evidence of preaching activities, but those instances are only seven in number at most.[7] It is true that Mr. Talarico, the company servant in Fort Lauderdale, wrote a letter in which he said he considered Hagaman "a regular minister of religion." He followed that statement by saying he "would not hesitate to assign him any of the duties regularly and customarily performed by an ordained minister," such as "conducting Bible studies, baptismal services, funeral discourses, marriage ceremonies," and so on. But "not hesitate to assign" is not the same as being assigned and carrying on these duties. There is evidence, undoubtedly, that Hagaman did engage in some religious activity, which he, himself, described as similar to that done by deacons in other denominations.[8] Everybody knows that a great deal of church work in every demomination is done by persons who devote themselves without compensation to the task. We know, too, that in many denominations laymen frequently make religious talks without thereby achieving in their own or anyone's mind any "ministerial status."

This case presents a problem of deciding on which side of the line Hagaman's activities fell. There were some things to indicate employment in a ministerial capacity. There were others to indicate that he had not reached in

[6] In the *Dickinson* case, supra, defendant was the "company servant" for Coalinga, California, and proved extensive preaching activities. We do not mean to indicate that only those Witnesses who are "company servants" can be exempted as ministers. See *Cox* v. *United States*, *supra*, at 449-450.

[7] In connection with one of those instances, there is an unexplained inconsistency, the significance of which we are perhaps not required to pass on. In the Board's file, which is in evidence, there is a photostat of a letter, dated May 2, 1951, from a man named Bruce E. Giffin in which he asked Hagaman to take his place in giving a discourse on Sunday, May 27, 1951. A circular announcement of the discourse accompanies the letter. But the postmark upon the photostat of the envelope attached thereto bears date June 3. The claim for deferred classification had been made in March, 1951.

[8] Hagaman was admitted several weeks before he filled out his questionnaire to the group called "pioneers." Pioneers, as we understand it, are not "company servants" but are a step up in ranks of the hierarchy from ordinary members. They are obliged to perform 100 hours a month in the group service. Hagaman's comparison to the work done by the deacons in other denominations seems to us quite apt.

the service of Jehovah's Witnesses the place where he could be called a "minister" in the sense in which that term is used by the United States, however it may be used by Jehovah's Witnesses. That being the case, the decision is for the administrative authorities. *Estep* v. *United States, supra,* at 122.

We now come to the point on which the Court divides. We do not disagree with the majority here and the judges in other circuits who have refused to reject all Jehovah's Witnesses from the conscientious objector category because of the "theocratic warfare" point. But we do not see any basis for assuming that Hagaman's classification as a conscientious objector was made because of Jehovah's Witnesses' adherence to the doctrine of "theocratic warfare," whatever that may mean.

The conscientious objector claim, it may be agreed, is the most difficult point in the case. If, as the majority in the *Dickinson* case says, the draft boards are now to be obliged to build a record, we still have the question of how much of a record it is going to take to support their conclusions. Decisions have said that mere suspicion is not enough, *Dickinson* v. *United States, supra,* at 397; *Schuman* v. *United States,* 208 F. 2d 801 (C. A. 9, 1953). On the other hand we do not suppose that the courts are going to require draft boards to go out and make investigations in the community and bring into their hearings witnesses to oppose claims for classification made by registrants. If they must do so, the administration of selective service laws will become a much more highly complicated process than it now is.

The question in this case, we think, should turn upon the administrative body's conclusion as to the sincerity of Hagaman's claim to be a conscientious objector. He did not have the same family background of membership in Jehovah's Witnesses that many others have had whose claims for conscientious objector classifications have come

into litigation.[9] One parent was a Jehovah's Witness; the other was a Lutheran. The parents did not live together. The boy spent part of his time with each. When he was sixteen he entered the John B. Stetson University in Deland, Florida, a Baptist institution. In the document filled out at the time of his registration there in 1946 he gave his religious preference as Lutheran. He had two years of a Business Administration course at Stetson. He registered for the draft in September, 1948. He had joined Jehovah's Witnesses just three months before that.

People do change their religious views, of course, and there is no disposition on our part to deny the sincerity of a Road to Damascus conversion. On the other hand when such conversion comes a very short time before one may become liable for military service, the question is suggested whether the conversion is a real or pretended one. That, obviously, is a question of fact. The question of fact was passed upon by the local Board in the first instance unfavorably to the registrant. That body not only had the registrant's papers before it, but also had the benefit of hearing and seeing him in a personal interview. The hearing officer on appeal believed in Hagaman's sincerity after seeing him and that appeal sustained the conscientious objector classification though denying the ministerial exemption. The final appeal restored the 1-A classification which the local Board had given.

When trial courts pass upon a question of fact, courts of appeals are to accept their conclusions unless clearly erroneous. When the question of fact is whether a given witness or litigant is telling the truth, it takes a very strong set of circumstances to prevail against the conclusion reached by the fact finder. Surely our supervision over the fact finders in the selective service process is not greater than that over trial courts. Legal questions, of course, we decide as we have in the first part of this opinion. And

[9] As for instance in *Pine* v. *United States*, cited in the majority opinion.

ultimate conclusions from evidentiary facts we can also pass upon to some extent. That is what we think the Supreme Court did in the *Dickinson* case, which dealt with the fact material out of which the claim for ministerial exemption arose. That is what we have done in the portion of this opinion dealing with the claim for exemption as minister. But when the question turns on a man's motives, review of the factual determination is a different thing. Two of the three bodies who have had Hagaman's case before them have ruled against his contention. We believe the factual conclusion should stand.

A suggestion from judicial sources that boards of appeals file reasons for conclusions is one which would make judicial review easier of course. "Opinions are required in our legal system in order that the reasoning which justifies a conclusion may be made manifest." Frankfurter, J., dissenting in *Darr* v. *Burford*, 339 U. S. 200, 225 (1950). But the Congress, in setting up draft boards and the various boards of appeals, did not require findings of fact, conclusions of law or opinions. We do not think that judges are authorized to impose such a requirement.

All of us think that the judgment of the district court should be affirmed on the first two points stated above. But the majority overrules us on the point of the conscientious objector classification.

Judges McLaughlin and Staley join in the dissenting portion of this opinion.

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Supreme Court of the United States

OCTOBER TERM, 1954

No. 164

PHILIP ANDREW WITMER,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

Petitioner's Reply to Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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HAYDEN C. COVINGTON
124 Columbia Heights
Brooklyn 1, New York
Counsel for Petitioner

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MAY IT PLEASE THE COURT:

Since the Clerk of this Court was informed by counsel for petitioner that no reply in opposition would be filed, there has been handed down by the United States Court of

Appeals for the Seventh Circuit a decision in direct conflict with the holding of the court below that the performance of civilian work in a defense plant was basis in fact for the denial of the conscientious objector status, which makes necessary this brief memorandum designated Petitioner's Reply to Brief in Opposition.

In *United States v. Wilson*, 7th, Cir., July 15, 1954, — F. 2d —, the Court said:

> "Neither do we think the defendant's employment as a railroad telegraph operator was in any way inconsistent with his claim to exemption as a conscientious objector. Section 6(j) of the Act, 50 U. S. C. A. App. Sec. 456(j), provides exemption for persons conscientiously opposed to 'participation in war in any form.' It would be wholly unrealistic to construe this language to mean that a person whose civilian employment indirectly contributed to the war effort could not, therefore, meet the statutory test for exemption. Such a construction of the Act would completely nullify the provisions granting exemption to conscientious objectors, for it is difficult to conceive of any gainful activity which, in periods of extensive mobilization and training, would not in some manner aid the common purpose. Moreover, the Act expressly recognizes that one may engage in civilian work contributing to the national welfare without thereby losing the right to be classified as a conscientious objector. Section 6(j) provides that persons conscientiously opposed to noncombatant service in the armed forces shall be ordered to perform 'such civilian work contributing to the maintenance of the national health, safety, or interest' as may be considered appropriate by the local board. It is perfectly clear in this case that the nature of the defendant's civilian occupation

> could not be a basis in fact for denying him the status of a conscientious objector."

It is respectfully submitted that the conflict between the court below and the United States Court of Appeals for the Seventh Circuit warrants the granting of the writ of certiorari in this case.

Respectfully submitted,

HAYDEN C. COVINGTON

124 Columbia Heights
Brooklyn 1, New York

Counsel for Petitioner

October 1, 1954.

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BRIEF FOR PETITIONER

HAYDEN C. COVINGTON

124 Columbia Heights
Brooklyn 1, New York

Counsel for Petitioner

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ONE

The denial of the conscientious objector status by the appeal board has without basis in fact; consequently, the final I-A classification was arbitrary and capricious. 28-40

TWO

The act and regulations do not permit the Department of Justice to recommend, or the appeal board to accept the recommendation, that willingness to work on a farm and to produce food to assist in the war effort is basis in fact for the denial of the conscientious objector status. 40-48

THREE

The local board deprived petitioner of his rights guaranteed by Section 1624.2 of the Selective Service Regulations by considering the case as out of its hands and by refusing to reopen the case and reclassify petitioner upon his personal appearance. 48-63

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Appendix A—February 1, 1951, issue of the *Watchtower* magazine, containing articles entitled "Why Jehovah's Witnesses Are Not Pacifists" and "Pacifism and Conscientious Objection—Is There a Difference?" ..... *accompanying this brief*

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Supreme Court of the United States

OCTOBER TERM, 1954

No. 164

PHILIP ANDREW WITMER,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Court of Appeals is reported. (*United States* v. *Witmer*, 3rd Cir., May 13, 1954, 213 F. 2d 95) It appears in the record. [R. 61-62] A memorandum opinion of the district court also appears in the record. [R. 52-59] It is reported in 115 F. Supp. 19. See also the opinion by the Court of Appeals in the companion case in the court below, *United States* v. *Hagaman*, 3rd Cir., 1954, 213 F. 2d

86. It is referred to in the opinion in this case by the Court of Appeals and appears as an appendix to the petition for writ of certiorari in this case, page 37.

JURISDICTION

The judgment of the Court of Appeals was entered on May 13, 1954. [R. 62] The time for filing the petition for writ of certiorari was extended to June 30, 1954. The petition for writ of certiorari was filed within the extended time. The writ was granted on October 14, 1954. [R. 79] The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).—See also Rules 37(b)(2) and 45(a), Federal Rules of Criminal Procedure.

STATUTE AND REGULATIONS INVOLVED

Section 1(c) of the Universal Military Training and Service Act (50 U. S. C. App. § 451(c)) provides:

"The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."—June 24, 1948, ch. 625, title I, § 1, 62 Stat. 604, amended June 19, 1951, ch. 144, title I, § 1(a) 65 Stat. 75.

Section 6(j) of the act (50 U. S. C. App. § 456(j), 65 Stat. 75, 83, 86) provides:

"*Conscientious objectors.*—Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any hu-

man relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President

may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors."—50 U. S. C. App. § 456(j), 65 Stat. 75, 83, 86.

Section 12(a) of the act (50 U. S. C. App. § 462(a)) provides:

" . . . Any . . . person . . . who . . . refuses . . . service in the armed forces . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment. . . ."

Section 1622.14 of the Selective Service Regulations (32 C. F. R. § 1622.14 (E. O. 10292, 16 F. R. 9862, Sept. 28, 1951)) provides in part:

"*Class I-O: Conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest.*—(a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but

for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to both combatant and noncombatant training and service in the armed forces. . . ."

Section 1624.1(a) of the Selective Service Regulations (32 C. F. R. § 1624.1(a), E. O. 9988, 13 F. R. 4874, Aug. 21, 1948, redesignated at 14 F. R. 5021, Aug. 13, 1949) provides:

"*Opportunity to appear in person.*—(a) Every registrant, after his classification is determined by the local board (except a classification which is itself determined upon an appearance before the local board under the provisions of this part), shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (SSS Form No. 110) to him. Such 10-day period may not be extended, except when the local board finds that the registrant was unable to file such request within such period because of circumstances over which he had no control."

Section 1624.2 of the Selective Service Regulations (32 C. F. R. § 1624.2, E. O. 9988, 13 F. R. 4874, Aug. 21, 1948, redesignated at 14 F. R. 5021, Aug. 13, 1949) provides:

"*Appearance before local board.*—(a) At the time and place fixed by the local board, the registrant may appear in person before the member or members of the local board designated for the purpose. The fact that he does appear shall be entered in the 'Minutes of Actions of Local Board and Appeal Board' on the Classification Questionnaire (SSS Form No. 100).

"(b) At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in de-

termining his proper classification. Such information shall be in writing, or, if oral, shall be summarized in writing and, in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. The member or members of the local board before whom the registrant appears may impose such limitations upon the time which the registrant may have for his appearance as they deem necessary.

"(c) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board shall consider the new information which it receives and shall again classify the registrant in the same manner as if he had never before been classified.

"(d) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board, as soon as practicable after it again classifies the registrant, shall mail notice thereof on Notice of Classification (SSS Form No. 110) to the registrant and on Classification Advice (SSS Form No. 111) to the persons entitled to receive such notice or advice on an original classification under the provisions of section 1623.4 of this chapter.

"(e) Each such classification shall be followed by the same right of appeal as in the case of an original classification."

Section 1624.3 of the Selective Service Regulations (32 C. F. R. § 1624.3, E. O. 10001, 13 F. R. 5488, Sept. 21, 1948, redesignated at 14 F. R. 5021, Aug. 13, 1949) provides:

"*Induction Postponed.*—A registrant shall not be inducted during the period afforded him to appear in person before a member or members of the local board, and if the registrant requests a personal appearance he shall not be inducted until 10 days after the Notice of Classification (SSS Form No. 110) is mailed to him by the local board, as provided in § 1624.2(d)."

Section 1626.25 of the Selective Service Regulations (32 C. F. R. § 1626.25 (E. O. 9988, 13 F. R. 4874, Aug. 21, 1948,

as amended by E. O. 10292, 16 F. R. 9862, Sept. 28, 1951)) provides:

"*Special provisions when appeal involves claim that registrant is a conscientious objector.*—(a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action:

"(1) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to combatant training and service in the armed forces, but not conscientiously opposed to noncombatant training and service in the armed forces, the appeal board shall first determine whether or not such registrant is eligible for classification in a class lower than Class I-A-O. If the appeal board determines that such registrant is eligible for classification in a class lower than I-A-O, it shall classify the registrant in that class. If the appeal board determines that such registrant is not eligible for classification in a class lower than Class I-A-O, but is eligible for classification in Class I-A-O, it shall classify the registrant in that class.

"(2) If the appeal board determines that such registrant is not eligible for classification in either a class lower than Class I-A-O or in Class I-A-O, the appeal board shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice.

"(3) If the registrant claims that he is, by reason of religious training and belief, conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces, the appeal board shall first determine whether or not the registrant is eligible for classification in a class lower than Class I-O. If the appeal board finds that the registrant is not eligible

for classification in a class lower than Class I-O, but does find that the registrant is eligible for classification in Class I-O, it shall place him in that class.

"(4) If the appeal board determines that such registrant is not entitled to classification in either a class lower than Class I-O or in Class I-O, it shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice.

"(b) No registrant's file shall be forwarded to the United States Attorney by any appeal board and any file so forwarded shall be returned, unless in the 'Minutes of Action by Local Board and Appeal Board' on the Classification Questionnaire (SSS Form No. 100) the record shows and the letter of transmittal states that the appeal board reviewed the file and determined that the registrant should not be classified in either Class I-A-O or Class I-O under the circumstances set forth in paragraph (a) (2) or (4) of this section.

"(c) The Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrants. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by his local board to perform for a period of twenty-four consecutive months civilian work contributing to the maintenance of the national health, safety, or interest. If the Department of Justice finds that the objections of the registrant are

not sustained, it shall recommend to the appeal board that such objections be not sustained.

"(d) Upon receipt of the report of the Department of Justice, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendation of the Department of Justice. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant both the letter containing the recommendation of the Department of Justice and the report of the Hearing Officer of the Department of Justice."

Section 1626.26 of the Selective Service Regulations (32 C. F. R. § 1626.26 (E. O. 9988, 13 F. R. 4874, Aug. 21, 1948, redesignated at 14 F. R. 5021, Aug. 13, 1949)) provides:

"*Decision of appeal board.*—(a) The appeal board shall classify the registrant, giving consideration to the various classes in the same manner in which the local board gives consideration thereto when it classifies a registrant, except that an appeal board may not place a registrant in Class IV-F because of physical or mental disability unless the registrant has been found by the local board or the armed forces to be disqualified for any military service because of physical or mental disability.

"(b) Such classification of the registrant shall be final, except where an appeal to the President is taken; *Provided*, That this shall not be construed as prohibiting a local board from changing the classification of a registrant in a proper case under the provisions of part 1625 of this chapter."

QUESTIONS PRESENTED

I.

Whether the denial of the claim for classification of petitioner as a conscientious objector by the appeal board was without basis in fact and, consequently, the final I-A classification was arbitrary and capricious.

II.

Whether the act and the regulations permit the Department of Justice to recommend to the appeal board to deny and whether the appeal board may deny the conscientious objector status because the petitioner, an objector to direct participation in the armed forces, is willing to work on a farm and produce food that might be held to be indirect participation in the war effort.

III.

Whether a local board can deny a full and fair hearing upon personal appearance through refusal to reopen and reclassify petitioner and then cure that deprivation of due process of law by merely giving notice of such illegal action.

STATEMENT OF THE CASE

This criminal action was started by indictment charging petitioner with violating the Selective Service Act of 1948, as amended, and the regulations thereunder, by failing to submit to induction. [R. 1, 3] The indictment charged that the petitioner refused to be inducted into the armed forces of the United States after having been properly classified and ordered to report for induction by his local board. [R. 1, 3] Petitioner was arraigned. He pleaded not guilty. [R. 1] There was a trial to the jury. [R. 1, 4] The case was called for trial on March 27, 1952, and was concluded on Monday, March 31, 1952. [R. 1, 4, 15] Evidence was received. [R. 4-16] The jury found petitioner guilty. [R. 1] The court heard argument on the motion for acquittal and took the case under advisement. [R. 1] An opinion was written and an order entered denying the motion. [R. 1, 52-59] The court sentenced petitioner to serve three years in the custody of the Attorney General. [R. 16] Notice of appeal was duly and timely filed. [R. 2] The court below affirmed. [R. 61-62]

Petitioner was born February 7, 1930. [R. 16] He registered with Local Board No. 28, Reading, Pennsylvania. [R. 16-17] On January 23, 1951, the local board mailed him a classification questionnaire (SSS Form No. 100). [R. 16] This was returned to the local board properly filled out on January 31, 1951. [R. 16] On page 7 of the questionnaire petitioner indicated that he had conscientious objections to combatant and noncombatant military service. He signed the statement requesting that the special form for conscientious objector be mailed to him. [R. 20]

In the classification questionnaire petitioner showed that he worked at a hat factory. [R. 20] He also showed that he operated his father's farm of 116 acres, 30 acres of which were under cultivation. [R. 19] He showed that he had completed eight years of elementary schooling. [R. 20]

The local board mailed to the petitioner a special form for conscientious objector (SSS Form No. 150) on January 31, 1951. [R. 21, 23] It was returned properly signed and filled out by the petitioner on February 5, 1951. [R. 23] Although Series I(B) of the form (page 1) was not signed, on page 4 of the form petitioner wrote as follows:

> "My training and belief in relation to a Supreme Being involves duties superior to those arising from any human relation. This prevents me from turning aside from those superior duties which I owe to a Superior Being.
>
> [signed] Philip A. Witmer
>
> "for section I (B)
> "Page 1" [R. 27]

Under Series II of the special form for conscientious objector petitioner stated that he believed in a Supreme Being. He described the nature of his beliefs involving duties superior to those arising from any human relation by the following:

> "I am absolutely neutral toward the political disputes and the international controversies and combats of this world. I take no active or violent part for either side, but pay my vows to God and always advocate his kingdom and way of salvation." [R. 24]

Petitioner showed the source of his training and belief supporting his claim by stating that he had been instructed by his parents in the study of the Bible and that at the age of eleven he himself began to study the Bible with the aid of the Watchtower publications. [R. 24] He stated in the form that he believed in the use of force only at the command of Almighty God. [R. 24] He further stated that he had demonstrated his convictions by the study of the Bible and by telling others about God's kingdom and "of how he will put a stop to all wars." [R. 24] He answered questions showing his general background, including schooling and employment. [R. 24-25] He showed that he was an active member of Jehovah's Witnesses and acknowledged the Watchtower Bible and Tract Society, Inc., of Brooklyn, New York, as the governing body of Jehovah's Witnesses. He stated that he had always been one of Jehovah's Witnesses. He gave references to the local meeting place and named the presiding minister, Richard Palms. Also, he attached to the special form for conscientious objector the February 1, 1951, issue of the *Watchtower* magazine (APPENDIX A to this brief) for a description of the official statement of Jehovah's Witnesses in relation to participation in war. He referred to this publication in his answers to Series IV 2(e). [R. 25-26]

Petitioner also gave references and signed a certificate that he had truthfully answered all the questions propounded in the form. [R. 26-27]

Petitioner was classified I-A (making him liable for unlimited military training and service) on February 21, 1951. [R. 21] On March 1, 1951, petitioner wrote a letter

requesting a personal appearance, in which he also requested an appeal. [R. 12-13, 27-28] The local board notified petitioner to appear before the board for a personal appearance on March 19, 1951. [R. 27]

At the trial in the court below a question was raised as to whether the request for personal appearance was within ten days as required by the regulations. The letter requesting personal appearance and appeal was written on March 1, 1951, and mailed on that date but not received by the board until March 5, 1951, which was more than ten days from the date of classification. The reason for the delay in receiving the letter was that the office of the board was not open on Saturday, March 3, and was closed on Sunday, March 4, as usual. The clerk found the letter at the office on arrival on March 5. [R. 11-12] Neither the trial court nor the local board held that the petitioner was too late in making the request. [R. 11, 53]

Petitioner appeared on March 19, 1951. [R. 4, 5, 9-10, 21, 33-34, 53-55] He submitted new information verbally and also filed with the board a letter and an affidavit. [R. 9, 28-29, 29-33, 54] The affidavit is by Richard B. Palms, the presiding minister of the local congregation of Jehovah's Witnesses. It vouches for the sincerity of the petitioner and his membership in the organization. [R. 9, 28-29, 53] A typewritten statement attached to the affidavit, consisting of three pages, explained why petitioner felt that he was a minister of religion and entitled to classification as such. [R. 9, 29-33, 53-54] The local board made a memorandum of what transpired upon the occasion of the personal appearance. It was dictated by the chairman of the board. [R. 7, 10, 33-34, 54-55] It reads as follows:

"March 19, 1951

"Re: Order #36-28-30-71 Philip Andrew Witmer

"The Board met with registrant today. The registrant informed the Board that he left his place of employment on March 3, where he had

worked for three years in a hat factory. The Board chairman immediately pointed out that he was classified as 1-A on February 21, which meant he left his position about two weeks later. He then mentioned that his father had a farm which had not been worked as a farm for 23 years but that he felt he was going to start getting this farm in shape. Prior to this time he stated he had gotten a few acres in shape for their own family use so that they would not be dependent upon other people.

"The registrant then pointed out that he was a minister of the Gospel and the only evidence he presented to substantiate this fact was some paraphernalia from the Watchtower Association of the Jehovah [sic] Witnesses. The registrant was asked if he was an ordained minister and he said Jehovah [sic] Witnesses became ordained when they started distributing their literature. The Board felt this was not sufficient evidence to warrant a 4-D Classification and informed the registrant his case would be sent up to the Appeal Board following his physical examination." [R. 33-34, 54-55]

There was considerable interrogation by counsel and the court as to what transpired upon the occasion of the personal appearance. The undisputed evidence developed at the trial establishes that petitioner was told that because he had requested an appeal no action would be taken upon his case; the classification would not be changed; no new classification card would be mailed and the file would be forwarded to the appeal board. The board admittedly informed petitioner at the conclusion of the personal appearance that the case was out of their hands because he had appealed. [R. 4, 5, 6-7, 8, 10, 13]

The clerk of the local board testified that it was the policy of the board, when no new evidence was presented justifying a change of classification, not to notify the registrant by mailing a notice of classification and not to consider the classification anew, but automatically to send the file to the appeal board without further action. [R. 4, 5-7, 10]

Following the personal appearance the file was sent to the appeal board. On April 24, 1951, the appeal board determined that petitioner should not be classified as a conscientious objector, either to combatant or noncombatant military service. In the same order the appeal board, as required by statute, ordered the entire file forwarded to the Department of Justice for an investigation and report to the appeal board on the validity of petitioner's claim for classification as a conscientious objector. This action is not referred to in the testimony. It appears in the draft board file. [R. 21, 34-35, 55]

The report of the Federal Bureau of Investigation was that the grade school teacher informed that petitioner had a high character and thought that he was "a sincere objector." [R. 37] Members of petitioner's church reported that he was active in the work of Jehovah's Witnesses and believed "him to be sincere." [R. 37] The employer of petitioner reported that petitioner was "very religious and very sincere in his beliefs." [R. 37] A fellow employee remembered him as being a very aggressive talker on religion and that he had heard him say "long ago that it is wrong to go to war." [R. 37] Petitioner's neighbors reported that the character of petitioner was good and that they thought his conscientious objector stand was made sincerely. [R. 37]

The facts stated by the hearing officer were that petitioner was one of Jehovah's Witnesses and that he signed Series XIV in the classification questionnaire showing that he was conscientiously opposed to participation in war, combatant and noncombatant. He refers to Form 150, submitted by petitioner, where he took the position all Jehovah's Witnesses take, that they were neutral in their atti-

tude toward war by the worldly governments and their obligations to God were superior to any other obligation. [R. 37-38] The hearing officer stated [R. 38]:

> "...This position is a form of pacifism peculiar to this group. They say that they would fight at the Lord's command, but that there is now no such command to them. They say that the ancient Jews were justified in making war because Jehovah commanded them to. They claim to be ministers of the gospel and object to army service because it will interfere with their ministry. They usually refer also to the Christian obligation to love others and not to hate or harm them. The registrant says on this point: 'We believe in love and you are supposed to love everybody even your enemies.' This registrant's pacifism is based on all these considerations. His position is the same as that of many members of this group whom I heard during the war and who were classified 4E.
>
> "As to taking noncombatant service, he quotes his old school teacher who used to say, the boy who makes the snow balls is just as responsible as the boy who throws them....
>
> "The registrant is evidently a life-long and rather active Jehovah's Witness. His desire to be deferred on other grounds does not seem to me to invalidate his claim to be regarded as a conscientious objector. . . ."

The hearing officer recommended in favor of petitioner's claim for classification as a conscientious objector, reporting [R. 39]:

> "I recommend that the registrant be classified IV-E."

On October 18, 1951, A. Devitt Vanech, Deputy Attorney General, reviewed the file and the report of the hearing

officer. [R. 35-36] He rejected the recommendation of the hearing officer and recommended that petitioner's claim for exemption as a conscientious objector be not sutsained:

> "After consideration of the character and good faith of the objections of the registrant, the Department of Justice recommends to your Board that his claim for exemption from combatant and noncombatant training and service be not sustained.
>
> "You will note that this Department does not concur in the recommendation of the Hearing Officer. January 30, 1951, while employed in a hat factory, registrant wrote a letter to the local board, in which he states: 'It is my ambition to become a farmer and devote all my time to farming. For this reason I am appealing to you to grant me an agricultural classification as I assure you that I will increase production year after year, and contribute a satisfactory amount for the war effort and civilian use.' In his letter to the local board dated March 1, 1951, registrant claims to be a minister of the Gospel. Registrant's inconsistent statements and his offer to contribute to the war effort are believed to be incompatible with a sincere conscientious objector claim." [R. 36]

The Deputy Attorney General added:

> "It is also noted that registrant did not sign series I (A) or (B) on SSS Form No. 150." [R. 36]

It should be observed that this comment by the Deputy Attorney General is without weight or moment in the consideration of the claim of petitioner as a conscientious objector, because, as stated at page 11, *supra,* although petitioner did not sign the printed statement on page 1 of the special form for conscientious objector (SSS Form No. 150), he wrote out and signed a statement on page 4 of the

special form that is identical to that appearing in the printed statement in Series I(B). [R. 27]

On November 6, 1951, petitioner was notified of a I-A classification by the appeal board. [R. 21] This is shown by the appeal record that appears in the draft board file. [R. 39]

Petitioner was mailed a notice to report for induction. [R. 21, 44] It was dated November 21, 1951. He was commanded to report and submit to induction on December 5, 1951. [R. 44]

Petitioner reported at the induction station but refused to submit to induction. [R. 48] He was taken out of the line-up and admonished if he did not submit to induction he would be prosecuted. He was offered noncombatant service in the armed forces as a conscientious objector, which he refused. He was again ordered to take one step forward when his name was called and he again refused to step forward and be inducted into the armed forces. [R. 49-50] The army officers reported from the induction station back to the local board that petitioner was a conscientious objector, that he was one of Jehovah's Witnesses and that because of conscience and religion he could not enter military service "even in a noncombat status." [R. 48, 49-50]

Witmer certified that he was a conscientious objector in his classification questionnaire. [R. 20] He filled out the conscientious objector form showing that he fit the definition of a conscientious objector. [R. 23-27] A ground for the motion for judgment of acquittal was that there was no basis in fact for the denial of the status. [R. 51-52] Both the trial court and the Court of Appeals held that there was basis in fact. [R. 52-54, 55-58, 61-62]

The hearing officer of the Department of Justice found that Witmer was sincere and possessed the necessary qualifications for classification as a conscientious objector. [R. 36-39] The Department of Justice recommended that petitioner be denied the conscientious objector status because

of his willingness to assist in the war effort by farming. [R. 35-36] In the motion for judgment of acquittal it was contended that there was no basis in fact for the denial of the conscientious objector status. [R. 51-52] The district court and also the Court of Appeals held that willingness to assist in the war effort by farming was sufficient basis for the denial of the conscientious objector status. [R. 55, 58-61]

The undisputed evidence showed that upon the occasion of the personal appearance the local board failed to reopen the case of petitioner and reclassify Witmer as required by Section 1624.2(c) of the Selective Service Regulations. The record also showed that the board, on personal appearance, considered the case to be out of its hands. [R. 4-10, 13, 21, 28-34, 53-55] Several grounds of the motion for judgment of acquittal complained of the denial of procedural due process of law on personal appearance. [R. 51] The trial court and the Court of Appeals held that there was no denial of procedural due process of law. [R. 56-59, 62] See also *United States* v. *Hagaman,* 3rd Cir., 1954, 213 F. 2d 86, which opinion in the companion case in the court below appears as an appendix to the petition for writ of certiorari in this case, page 37.

SUMMARY OF THE ARGUMENT

ONE

The denial of the conscientious objector status by the appeal board was without basis in fact; consequently, the final I-A classification was arbitrary and capricious.

The undisputed documentary proof showed that Witmer came within the definition of conscientious objector in the act. It showed his belief in the Supreme Being, his objection to military service, his religious training and belief as one of Jehovah's Witnesses and that his objections did not come from political, sociological or philosophical grounds. The draft board file contains two articles on the conscientious

objections of Jehovah's Witnesses. These appear in the *Watchtower* magazine of February 1, 1951. One is entitled "Why Jehovah's Witnesses Are Not Pacifists." The other is entitled "Pacifism and Conscientious Objection—Is There a Difference?" (This magazine is APPENDIX A to this brief.) These articles are summarized in the main part of this argument under this point, *infra,* pp. 29-32.

The proof showed that Witmer, as one of Jehovah's Witnesses, is separate and apart from this world. He relied on the statement of Jesus that Christians are no part of this world. (John 17:14) His citizenship is in heaven. (Philippians 3:20) He believed in the commandment of the apostle not to entangle himself with the affairs of this life. (2 Timothy 2:3, 4) The weapons of warfare that petitioner is authorized to use are limited to words, oral and printed. He is authorized to fight for the faith, using the sword of the spirit, which is the Word of God. (Ephesians 6:17) He is forbidden to use the weapons of warfare of this world. He declared that he cannot desert the Lord's army to do service in the armies of this world.

Witmer believes in self-defense, but this does not mean that he is authorized to engage in service in the armed forces. He maintains a position of strict neutrality. It should be remembered that neither Jesus nor the early Christians enrolled in the Roman armies. They refused to do military service and were persecuted.

In situations where there is no contradiction of the documentary evidence, as here, the courts have held in conscientious objector cases that the rule laid down in *Dickinson* v. *United States,* 346 U. S. 389, 396-397, 399, (1954), applies. (*Weaver* v. *United States,* 8th Cir., 1954, 210 F. 2d 815, 822-823; *Taffs* v. *United States,* 8th Cir., 1953, 208 F. 2d 329, 331-332; *United States* v. *Hartman,* 2d Cir., 1954, 209 F. 2d 366, 368, 369, 371; *Pine* v. *United States,* 4th Cir., 1954, 212 F. 2d 93, 96-97; *Jewell* v. *United States,* 6th Cir., 1953, 208 F. 2d 770, 771-772; *Jessen* v. *United States,* 10th Cir., 1954, 212 F. 2d 897, 899-900; *United States* v. *Wilson,* 7th Cir.,

1954, 215 F. 2d 443, 445, 446) These cases are not to be distinguished because of the rejection of the various speculations urged as basis in fact. The documentary evidence in each case showed the same facts as those established in this case.

The failure of Witmer to sign the conscientious objector blank is immaterial. Local Board Memorandum No. 41 authorized the preparation of his own statement containing the same language that appears in Series I(B) of the conscientious objector form.

That Witmer may have changed his claims for classification three times during the history of his case before the board does not give basis in fact for the denial of the conscientious objector claim. Section 1625.1(b) of the Selective Service Regulations required him to state all facts that would justify different classification. The giving of information and the making of three claims at one time or consecutively may not be relied on as basis for the denial of the conscientious objector status. Witmer was not inconsistent in making his several claims before the board. —*Taffs* v. *United States,* 8th Cir., 1953, 208 F. 2d 329, 331.

TWO

The act and regulations do not permit the Department of Justice to recommend, or the appeal board to accept the recommendation, that willingness to work on a farm and produce food to assist in the war effort is basis in fact for the denial of the conscientious objector status.

Section 6(j) provides for the recommendation of the Department of Justice. This is implemented by Section 1626.25 of the regulations. These make the recommendation a vital link in the chain of administrative proceedings. It is necessary that the Department of Justice proceedings be in accordance with law; otherwise the draft board proceedings are void.

In Section 6(j) of the act Congress did not confine conscientious objections to war in any form but extended

them to direct participation in the armed forces. Nothing can be found in the act that indicates that performance of civilian work that indirectly contributes to the war effort is basis in fact for the denial of the conscientious objector claim. Congress did not intend to allow reliance upon willingness to participate indirectly in war by performance of civilian work as a basis for the denial of the conscientious objector claim. The performance of civilian work by a conscientious objector to military service is not basis in fact for the denial of the claim for exemption.—*United States* v. *Wilson,* 7th Cir., 1954, 215 F. 2d 443, 446; *Hinkle* v. *United States,* 9th Cir., Sept. 24, 1954, — F. 2d — ; *Franks* v. *United States,* 9th Cir., Oct. 4, 1954, — F. 2d — ; *Goetz* v. *United States,* 9th Cir., Oct. 14, 1954, — F, 2d — .

The interpretation of the statute to allow the forfeiture of Witmer's claim for conscientious objection because of his willingness to help in the war effort by farming is unreasonable. A proper interpretation of the act should limit consideration to his willingness to participate in military training and service directly. If the statute is not interpreted to limit consideration of the type of service to direct participation in the armed forces and allow the board to consider indirect participation by civilian work, then it will be impossible for a conscientious objector to do anything. In time of war every civilian activity is indirectly a participation in the war effort. The interpretation by the court below completely nullifies the exemption extended to conscientious objectors because of willingness to perform civilian work contributing to the war effort. This interpretation is judicial legislation that flies in the face of the act. The construction is subversive of the intent of Congress.

Congress was dealing only with the problem of raising an army. It was not interested in the type of work performed by persons that it exempted from training and service as soldiers. The nearer the participation in the war effort by civilians outside, the better it was for the nation, Congress considered. Deferments were granted to per-

sons to participate in essential work either directly or indirectly contributing to the war effort. Farmers were exempted because of their contribution to the war effort. So were men engaged in other necessary services, such as defense work or work in the merchant marine. There is absolutely nothing in the statute or the regulations that says that a conscientious objector cannot perform essential work contributing to the national defense or the war effort as a civilian employee. It is only when the conscientious objector is willing to perform combatant or noncombatant service that he can be denied his claim for classification.

Congress provided that conscientious objectors be required to perform civilian work contributing to the national safety and welfare. There is nothing in the act that forbids the Government from requiring conscientious objectors to work in defense plants or perform services connected with the war effort. Since a conscientious objector can be ordered to do defense work or perform services in a war plant, how can it be said that his willingness to perform such services without being ordered to do so is basis in fact for his denial of the claim for exemption?

His sincerity is not questioned even if he is willing to go into the armed services and do hospital work. He may wear a uniform and still no one will challenge his good faith. If a conscientious objector can wear a uniform and do hospital work in the army and still be entitled to claim his conscientious objections, then how can it be said that the performance of civilian work is basis in fact for the denial of the conscientious objector status?

The interpretation placed upon the act by the court below is inconsistent with the act itself. Congress rejected the specious position of the Government for the reasons stated by this Court in *Girouard* v. *United States*, 328 U. S. 61, 68, 69 (1946).

Congress did not extend conscientious objections to objection to war in any form. Congress limited the objection to direct performance of military service. Nothing is said

in the act that either directly or indirectly limits the type of civilian work a conscientious objector is willing to perform. The interpretation of the court below puts a vague and indefinite dragnet upon the statute. It places an illegal, never-ending and uncontrollable scope of inquiry never contemplated by the act.

The provision for the recommendation by the Department of Justice and the consideration thereof by the appeal board makes the procedure a vital link in the chain of administrative proceedings. The recommendation must be in accordance with law. When the court below approved the irrelevant and immaterial recommendation by the Department of Justice (because Witmer was willing to assist in the war effort by farming) and the appeal board acted upon it, illegal and fictitious standards were employed to defeat the valid claim of Witmer. Fictitious and illegal standards incorporated into the draft board proceedings destroy the classification.—*Annett* v. *United States,* 10th Cir., 1953, 205 F. 2d 689, 691; *Hinkle* v. *United States,* 9th Cir., Sept. 24, 1954, — F. 2d — ; *Clementino* v. *United States,* 9th Cir., Sept. 27, 1954, — F. 2d —.

That Witmer was willing to do work on a farm does not in any way provide basis in fact for the denial of the conscientious objector status. The position of the court below is contrary to that of President Lincoln on this question.—See Selective Service System, *Conscientious Objection,* Special Monograph No. 11, Vol. I, pp. 42-43, Washington, Government Printing Office, 1950.

That Witmer was willing to assist in the war effort to the extent of farming is wholly irrelevant and immaterial. —*United States* v. *Wilson,* 7th Cir., 1954, 215 F. 2d 443, 446; *Goetz* v. *United States,* 9th Cir., Oct., 14, 1954, — F. 2d —; *Franks* v. *United States,* 9th Cir., Oct. 4, 1954, — F. 2d —.

If extended to its logical extreme the interpretation placed upon the act by the court below would require a conscientious objector to refuse to pay his income taxes or any other taxes that indirectly contribute to the war

effort of the nation. The interpretation requires the conscientious objector to do nothing in time of war. He is required to go on a sit-down strike. In fact he is banned by law from the performance of any sort of work that indirectly contributes to the defense effort of the nation. Such unreasonable interpretation of the statute should be rejected and condemned in this case.

THREE

The local board deprived petitioner of his rights guaranteed by Section 1624.2 of the Selective Service Regulations by considering the case as out of its hands and by refusing to reopen the case and reclassify petitioner upon his personal appearance.

Petitioner was told by the local board that because he had appealed his case no action would be taken on his request for reclassification at his personal appearance. The undisputed evidence shows that it was the policy of the board never to reopen and reclassify (as required by the regulations) on personal appearance when there was no new evidence presented. This policy is contrary to *United States* v. *Stiles,* 3rd Cir., 1948, 169 F. 2d 455. It denied the plain mandate of Section 1624.2(b) and (c) of the regulations.

The limitation of the scope of review (*Estep* v. *United States,* 327 U. S. 114, 121-122 (1946)) requires that the court insist on a strict compliance with the requirements of procedural due process fixed by the regulations. (*N. L. R. B.* v. *Cherry Cotton Mills,* 5th Cir., 1938, 98 F. 2d 444, 446) The draft boards must strictly comply with the procedural mandate of the regulations.—*Ver Mehren* v. *Sirmyer,* 8th Cir., 1929, 36 F. 2d 876, 881; *United States* v. *Zieber,* 3rd Cir., 1947, 161 F. 2d 90, 92; *United States* v. *Graham,* N. D. N. Y., 1952, 108 F. Supp. 794, 797; *Bejelis* v. *United States,* 6th Cir., 1953, 206 F. 2d 354, 358.

Martin v. *United States,* 4th Cir., 1951, 190 F. 2d 775 (certiorari denied 342 U. S. 872 (1951)), is distinguished from

this case as it is from *United States* v. *Stiles*, 3rd Cir., 1948, 169 F. 2d 455. This case is the same as *United States* v. *Stiles, supra.* In the *Martin* case there was a reopening of the case and a reclassification. In the *Stiles* case and in this case there was no reopening of the classification. The local board did not consider the case *de novo.*

The local board on personal appearance considered only the ministerial claim for exemption without a reopening. Nowhere did the board pass upon the claim for classification as a farmer or upon the conscientious objector claim. There was no reclassification. The board merely declared that there was no new evidence warranting the granting of the minister's exemption. This did not spell out a consideration of the conscientious objector classification or the farmer's deferred status.

The giving of notice of the illegal action by the local board does not cure the refusal to reopen. The refusal to reopen was illegal action. Notice of unlawful action (failure to reconsider) did not make the case the same as that of *Martin, supra,* where there was a reopening and a reclassification. In the *Martin* case, *supra,* there was actual notice orally given of lawful procedure taken by the local board. Here there was actual notice given of unlawful action taken by the local board. The board told Witmer that his case was out of its hands because he had taken an appeal. This illegal action is contrary to *United States* v. *Zieber,* 3rd Cir., 1947, 161 F. 2d 90; compare *United States* v. *Stiles,* 3rd Cir., 1948, 169 F. 2d 445.

The oral testimony relied on by the Government cannot be used to impeach the draft board memorandum made upon personal appearance that the board refused to reopen and reconsider the case. This evidence is incompetent. (*United States* v. *Hufford*, M. D. Pa., 1952, 103 F. Supp. 859, 862) Failure to consider the conscientious objector claim on personal appearance was a violation of the regulations.—32 C. F. R. § 1624.2(c); *Knox* v. *United States*, 9th Cir., 1952, 200 F. 2d 398, 401-402.

The regulations required the local board to give a notice of reclassification. Notice that the local board refused to reopen and reconsider the case on personal appearance is not equivalent to the statutory following personal appearance, requiring a new classification. (See *United States* v. *Stiles*, 3rd Cir., 1948, 169 F. 2d 455, 458-459; *United States* v. *Graham*, N. D. N. Y., 1952, 108 F. Supp. 794, 796-797.) The local board had no authority to issue the order to report for induction until the notice following reopening on personal appearance was given.

Witmer's filing of a dual request for personal appearance and for an appeal was proper. This does not justify the action of the board in considering the case to be out of its hands.—Local Board Memorandum No. 53, Selective Service System, January 14, 1953.

The failure to give written notice is not harmless error. It is grievous and fundamental. It was a complete omission to follow statutory steps required by the Selective Service Regulations. (*United States* v. *Zieber*, 3rd Cir., 1947, 161 F. 2d 90; *United States* v. *Strebel*, D. Kans., 1952, 103 F. Supp. 628; *United States* v. *Graham*, N. D. N. Y., 1952, 108 F. Supp. 794) The regulations that were in force at the time of the personal appearance required a *de novo* consideration of the case and a reclassification. These regulations were changed on September 25, 1951, after the date of the personal appearance of the petitioner in this case.

Regardless of whether error was committed in failing to comply with the statutory requirements of Section 1624.2(b) of the regulations by reopening and reconsidering the case, it nevertheless remains a fundamental violation of procedural due process. It is that the local board refused to consider petitioner's entire case on personal appearance. He was denied a full and fair hearing. The board rejected his evidence. It refused to exercise any responsibility whatever on personal appearance. When the board considered that his case was out of its hands because he had taken an appeal the board refused to consider the evidence at the personal ap-

pearance. This was equivalent to a denial of personal appearance. (*Morgan* v *United States,* 298 U. S. 468, 480-481 (1936); *United States* v. *Zieber,* 3rd Cir., 1947, 161 F. 2d 90, 93; *United States* v. *Romano,* S. D. N. Y., 1952, 103 F. Supp. 597; *United States* v. *Peterson,* N. D. Cal. S. D., 1944, 53 F. Supp. 760; *United States* v. *Laier,* N. D. Cal. S. D., 1943, 52 F. Supp. 392) There has been a denial of due process in this case.

ARGUMENT

ONE

The denial of the conscientious objector status by the appeal board was without basis in fact; consequently, the final I-A classification was arbitrary and capricious.

The undisputed documentary evidence in the file before the appeal board showed that the petitioner was conscientiously opposed to participation in combatant and noncombatant military service. He showed: (1) he believed in the Supreme Being, (2) he was opposed to participation in combatant and noncombatant military service, (3) he based his belief and opposition to service on religious training and belief as one of Jehovah's Witnesses and (4) such stand did not spring from political, sociological or philosophical beliefs. This showing brought him squarely within the statute and the regulations providing for classification as a conscientious objector. This entitled him to exemption from combatant and noncombatant military training and service.

As a part of his draft board papers petitioner filed the *Watchtower* magazine of February 1, 1951. [R. 56] He incorporated and made a part of his file two articles. One is entitled "Why Jehovah's Witnesses Are Not Pacifists." The other is entitled "Pacifism and Conscientious Objection—Is There a Difference?" Nine copies of this magazine have been

filed with the Clerk of this Court to accompany the distribution of this brief. They are marked as APPENDIX A. (See also *United States* v. *Hartman*, 2d Cir., 1954, 209 F. 2d 366, 370.) A summary of these two articles shall now be made.

I.

"WHY JEHOVAH'S WITNESSES ARE NOT PACIFISTS"

In 1950 Jehovah's Witnesses assembled in convention at Yankee Stadium, New York city. Ten thousand foreign delegates had difficulty in clearing immigration to attend the assembly because of the false charge that they were extreme pacifists. The American delegates unanimously passed a regret and protest—a million copies of which were distributed.

The definition of "pacifist" found in Webster's *Dictionary* is relied upon. That definition of pacifist does not fit a true Christian. Jehovah's Witnesses began with Abel. A long list of witnesses for Jehovah have records in theocratic warfare showing they were not pacifists. The exploits of Abraham, Moses, Joshua, Barak, Gideon, Jephthah, Samson, Samuel and David demonstrate this.

The fighting experiences of Nehemiah, Mordecai and Esther while in captivity in Babylon and Persia further prove Jehovah's Witnesses of old were not pacifists. The experiences of Daniel under King Darius the Mede and Nehemiah under Cyrus and Ahasuerus, the Persian kings, show they were not pacifists. The military exploits of all these famous witnesses for Jehovah were a part of theocratic warfare. However, such witnesses did not fight for Babylon, the Medes or the Persians. They fought under the direction of God for the theocratic nation of Israel. Since the fall of the Jewish nation and the advent of Christianity the warfare of his Christians has not extended to military weapons.

Because of this change Jehovah's Witnesses are, however, not pacifists. They are conscientious objectors to war and the "defense efforts" of Christendom and the rest of the world. The objections of Jehovah's Witnesses are based on God's Word, the Bible. Jehovah's Witnesses are neutral toward the wars between the nations. They do not campaign against the war efforts of the nations, and they do not oppose those who conscientiously participate in the war efforts.

Jehovah's Witnesses take the same neutral stand toward war as did Jesus. He commanded against the use of the sword. Jehovah's Witnesses, while neutral to war, are not pacifists engaged in resisting war or interfering with the wars between nations.

Jehovah's Witnesses do not oppose Jehovah's great war that will destroy the nations of the Devil's world at Armageddon. They proclaim this coming destructive warfare against the world. Christ Jesus will lead the invisible forces of Jehovah and bring about the destruction of the nations of this evil world as Jehovah's Field Marshal at Armageddon.

II.

"Pacifism and Conscientious Objection —Is There a Difference?"

Jehovah's Witnesses will have no part in the violent warfare of this world and will not participate in the armed forces of Jehovah at Armageddon. This great battle will be fought by the angelic forces of Jehovah, led by Christ Jesus. Jehovah's Witnesses, while declaring and preaching the battle of Armageddon, follow the rule laid down by Christ Jesus. That rule did away with the Mosaic law of retaliation. This is the philosophy of "eye for eye and tooth for tooth." Instead of this rule the modern-day Christians, Jehovah's Witnesses, follow the rule of love of God and love of neighbor. Christians do good to those who speak

and do evil against them. There is no retaliation by Jehovah's Witnesses. Killing a burglar who breaks in at night is justified. Killing a thief who breaks in by day is condemned.

The rule of love and of no retaliation stated in the sermon on the mount is only part of the basis of conscientious objection of Jehovah's Witnesses.

Jehovah's Witnesses are Scripturally authorized to defend themselves according to the law of the land. When attacked they can Scripturally resist attack by the use of force. They do not arm themselves or carry carnal weapons. They will not retreat when attacked at their homes or when at meetings of their church but will retreat when attacked on public property or on the property of others. In such situation they shake the dust off their feet and do not give what is holy to dogs or throw pearls before swine.

Jesus said: "Render therefore unto Caesar the things which are Ceasar's; and unto God the things that are God's." (Matthew 22:21) God and not "Caesar" is the giver of life. The life of a Christian is dedicated to God and can not be transferred to Caesar. The lives and service of Jehovah's Witnesses belong to God, and not to Caesar. No man can serve two masters says Jesus' sermon on the mount. The dedication of Jehovah's Witnesses to God is a relation to the "Supreme Being involving duties superior to those arising from any human relation." This is a quotation from the Selective Service Act of 1948. Jehovah's Witnesses take the position of the apostles of Jesus: "We must obey God as ruler rather than men."—Acts 5:29, *New World Translation.*

The words of Jesus about paying back to Caesar the things that are Caesar's were limited by Jesus to payment of taxes and were not extended by him to military service. This is emphasized by what Jesus told a representative of Caesar, Pilate. He said: "My kingdom is no part of this world. If my kingdom were part of this world, my attendants would have fought that I should not be delivered up

to the Jews." (John 18:36, *New World Translation*) Jesus also stated that the world hates Jehovah's Witnesses because they are neutral.

Jehovah's Witnesses are minister-ambassadors. They occupy a neutrality and exempt status from military service as did the priests and Levites in the nation of Israel. Even theocratic warfare does not require a minister to war; but Jehovah God protects his ministers. This principle is followed by Jehovah's Witnesses in dealing with the warfare of modern-day nations.

The only weapons of warfare that Jehovah God permits his witnesses to use are spiritual weapons: oral words, printed words and the sword of the spirit, which is the word of God contained in the Bible. Jehovah's Witnesses are Christian soldiers enlisted in God's army and as such cannot desert his forces. They cannot break their agreement to keep ministering and preach the gospel. To do so would mean their death.

Jehovah's Witnesses are an "earth-wide brotherhood" society. It follows that there cannot be slaying of one Christian by another Christian. This spiritual brotherhood is another basis for the conscientious objections of Jehovah's Witnesses. This is only a partial statement of the conscientious objections of Jehovah's Witnesses; it is enough, however, to prove the consistent neutrality of Jehovah's Witnesses and their lack of pacifism.

Based upon the *Watchtower* magazine of February 1, 1951, the argument that immediately follows is here appropriate.

The fact that entering "Caesar's" armed forces is usually by conscription or forced service does not make it Scripturally proper. Regardless of whether the service is voluntary or by capitulation to commands the situation is the same: the Christian minister of Jehovah thus gets

unscripturally involved in the affairs of the nations of this world. Petitioner believes that he who is a friend of the world is an enemy of God. (James 4:4) A Christian minister does not take a course of action that is at enmity with God. He must follow in the footsteps of the Lord Jesus Christ and keep himself unstained by the world. (1 Peter 2:21; James 1:27, *An American Translation*) This he does by faithfully sticking to his post of duty as a minister of Jehovah. He does not abandon it to participate in the controversies of this world of Satan.

It is true that Jehovah's Witnesses reside in all the nations of the world. That fact does not mean that they are mixed up with the political affairs or the international controversies of such nations. They are in the world but not of it. Jesus prayed to his Father: "I have given your word to them, but the world has hated them, because they are no part of the world just as I am no part of the world." (John 17:14, *New World Translation*) Jehovah, through Christ Jesus, has taken them out of the controversies and affairs of this world and drawn them into the exclusive business of preaching the good news of Jehovah's kingdom, and, as ambassadors to the nations of the world, carrying his warning message of the coming battle of Armageddon. "As for us, our citizenship exists in the heavens, from which place also we are eagerly waiting for a savior, the Lord Jesus Christ."—Philippians 3:20, *New World Translation;* John 15:19.

Jehovah's Witnesses do not entangle themselves in the affairs of this world, because they are soldiers in the army of Jehovah. "Endure hardness, as a good soldier of Jesus Christ. No man that warreth entangleth himself with the affairs of this life; that he may please him who hath chosen him to be a soldier." (2 Timothy 2:3, 4) As such Christian soldiers they fight to get the message about God's kingdom to every creature.—Mark 16:15.

Jehovah's Witnesses fight lawfully as such dedicated soldiers with all the legal instruments, such as the con-

stitutional rights, the statutory rights and other lawful rights granted to them by the nations of this world. They fight for freedom on the home front of the nation where they reside. They fight to defend and legally establish the good news before courts, ministers, officials, administrative boards and other agencies of governments. (Philippians 1:7, 16) They fight with weapons that are not carnal. These are the mouth, the faculty of reason, the process of logic and the law of the land. "For though we walk in the flesh, we do not wage warfare according to what we are in the flesh. For the weapons of our warfare are not fleshly, but powerful by God for overturning strongly entrenched things. For we are overturning reasonings and every lofty thing raised up against the knowledge of God, and we are bringing every thought into captivity to make it obedient to the Christ."—2 Corinthians 10 : 3-5, *New World Translation, Weymouth.*

In addition to the legal instruments that such Christian soldiers use the great weapon that they wield among the nations of the earth is the "sword of the Spirit, which is the word of God." (Ephesians 6:17) As soldiers of Jehovah and Christ they put on only the uniform that is prescribed by the law of God for Christian soldiers, his witnesses, to wear. That uniform is the armor of God. They have on the helmet of salvation and the breastplate of righteousness. —Ephesians 6 : 10-13, *New World Translation.*

Since they are in the Lord's army of gospel preachers, they certainly have conscientious objections to serving in the armies of the evil world of Satan. As soldiers of God they cannot engage in the conflicts and warfare that flow from the affairs of this world. They cannot be in two armies at the same time. Since they have been enlisted and serve in the Lord's army as his ministers they must be at their missionary posts of duty. They cannot leave such posts in order to take up service in some other army. To quit the Lord's army and join the armies of Satan's world would make the soldiers of God deserters. Deserters

are covenant-breakers. "Covenant-breakers . . . are worthy of death."—Romans 1:31, 32.

The nations of this world cannot excuse the Lord's soldier from the penalty of death prescribed by Almighty God for deserters from his army. "Caesar," not being able to relieve him from his covenant obligations or violations thereof, should not command him to become a renegade and deserter from the Lord's army to join his. That would result in his everlasting death. "And do not become fearful of those who kill the body but can not kill the soul; but rather be in fear of him that can destroy both soul and body in Gehenna. Do not be afraid of the things you are destined to suffer. Look! the Devil will keep on throwing some of you into prison that you may be fully put to the test, and that you may have tribulation ten days. Prove yourselves faithful even with the danger of death, and I will give you the crown of life."—Matthew 10:28; Revelation 2:10, *New World Translation.*

The law of God and the law of the land authorize a person to protect his home against crime or violence. Jehovah's Witnesses are justified in killing a person who breaks into their home if it is necessary to repel the assault. (Exodus 22:2) These are the only circumstances when the use of force or killing is authorized by the law of God. There are no other circumstances where the law of God authorizes killing.

There is no Scriptural authorization for Jehovah's Witnesses to bear arms in the service of the armed forces of any nation. Jehovah's Witnesses have conscientious objections, based on such training and belief, to rendering such service. These objections are conscientiously based upon the law of Almighty God. That law, which is supreme, commands the true Christian minister to maintain an attitude of strict neutrality toward participation in international, national or local conflicts. This strict neutrality required by the supreme law is enforced by the commands of God that prohibit Jehovah's Witnesses from

bearing arms or joining the armed forces of the nations of this world.

There is no record that the Lord Jesus or his apostles or disciples entered the armies of Caesar. The record of secular history shows that they were thrown to the lions and persecuted because of following the command of Christ Jesus to disassociate themselves from the affairs of the evil world.

The basis of objections to military service by followers of Christ Jesus, including the early Christians at Rome and their modern-day counterparts, Jehovah's Witnesses, can best be summed up by Jesus, who declared, "My kingdom is no part of this world. If my kingdom were part of this world, my attendants would have fought that I should not be delivered up to the Jews. But, as it is, my kingdom is not from this source." (John 18:36, *New World Translation*) Since Jehovah's Witnesses are not of this world, then, as the Lord Jesus did not, they cannot fight in or represent the armed forces of the nations of this world represented by "Caesar." Then, accordingly, they render unto God that which is God's by remaining steadfastly in his army of witnesses and refusing to volunteer or submit to the armed forces of Caesar in international conflicts. They render unto Caesar all obligations of citizenship that do not require them to violate God's law. Thus they do as Jesus said: "Pay back Caesar's things to Caesar, but God's things to God."—Mark 12:17, *New World Translation.*

It has been held by many courts of appeals that the rule laid down in *Dickinson* v. *United States,* 346 U. S. 389, 396-397, 399 (1953), holding that if there is no contradiction of the documentary evidence showing exemption as a minister there is no basis in fact for the classification, also applies in cases involving claims for classification as conscientious objectors.—*Weaver* v. *United States,* 8th Cir., 1954, 210 F. 2d 815, 822-823; *Taffs* v. *United States,* 8th Cir., 1953, 208 F. 2d 329, 331-332; *United States* v. *Hartman,* 2d Cir., 1954, 209 F. 2d 366, 368, 369, 371; *Pine* v. *United*

States, 4th Cir., 1954, 212 F. 2d 93, 96-97; *Jewell* v. *United States,* 6th Cir., 1953, 208 F. 2d 770, 771-772; *Schuman* v. *United States,* 9th Cir., 1953, 208 F. 2d 801, 804-805; *Jessen* v. *United States,* 10th Cir., 1954, 212 F. 2d 897, 899-900; *United States* v. *Close,* 7th Cir., 1954, 215 F. 2d 439, 441; *United States* v. *Wilson,* 7th Cir., 1954, 215 F. 2d 443, 445, 446.

In *Jessen* v. *United States,* 10th Cir., 1954, 212 F. 2d 897, 900, after quoting from *Dickinson* v. *United States,* 346 U. S. 389 (1953), the court said:

> "Here, the uncontroverted evidence supported the registrant's claim that he was opposed to participation in war in any form. There was a complete absence of any impeaching or contradictory evidence. It follows that the classification made by the State Appeal Board was a nullity and that Jessen violated no law in refusing to submit to induction."

The decision of the court below is in direct conflict with the holdings in other cases decided by other courts of appeals. In those cases the appellants, like petitioner here, were Jehovah's Witnesses. They showed the same religious belief, the same objection to service and the same religious training. While different speculations were relied upon by the Government, which were discussed and rejected by the courts in those cases, the courts were also called upon to say, on facts identical to the facts in this case, whether there was basis in fact. For instance, see *Jessen* where the Tenth Circuit (after following *Taffs* v. *United States,* 8th Cir., 1953, 208 F. 2d 329) said (212 F. 2d, p. 899): "The remaining question is whether there was any basis in fact for the classification made by the State Appeal Board."

The holdings with which the holding of the court below directly conflicts on this point are: *Annett* v. *United States,* 10th Cir., 1953, 205 F. 2d 689, 692; *United States* v. *Pekarski,* 2d Cir., 1953, 207 F. 2d 930, 931; *Taffs* v. *United States,*

8th Cir., 1953, 1953, 208 F. 2d 329, 331-332; *Jewell* v. *United States,* 6th Cir., 1953, 208 F. 2d 770, 771-772; *Schuman* v. *United States,* 9th Cir., 1953, 208 F. 2d 801, 804-805; *United States* v. *Hartman,* 2d Cir., 1954, 209 F. 2d 366, 368-369, 370-371; *Pine* v. *United States,* 4th Cir., 1954, 212 F. 2d 93, 96-97; *Jessen* v. *United States,* 10th Cir., 1954, 212 F. 2d 897, 899-900; *United States* v. *Close,* 7th Cir., 1954, 215 F. 2d 439, 441; *United States* v. *Wilson,* 7th Cir., 1954, 215 F. 2d 443, 445, 446. And these cases ought not to be pushed aside on the specious but factitious ground that because the courts in some of those cases discussed the speculations urged on the courts as basis in fact the cases are different. They are not different, because on the question of whether or not there was basis in fact the evidence in each case is identical to the facts in this case and the holdings were the opposite to that made by the court below in this case. Such attempted distinction would be a distinction without a difference. The cases above cited are identical to the facts in this case in so far as the statements in the draft board record showing conscientious objection are concerned.

In the court below respondent placed emphasis upon the failure of Witmer to sign the Series I(B). Local Board Memorandum No. 41, issued by National Headquarters, Selective Service System, November 30, 1951, as amended August 15, 1952, provides in paragraph 2 as follows:

> "2. What *constitutes a claim of conscientious objection.*— A registrant should be considered to have claimed conscientious objection to war if he has signed Series XIV of the Classification Questionnaire (SSS Form No. 100), if he has filed a Special Form for Conscientious Objector (SSS Form No. 150), or if he has filed any other written statement claiming that he is a conscientious objector."

It should also be remembered that Witmer actually prepared his own statement containing substantially the same language as appears in Series I(B). [R. 27]The court below

has held in *Berman* v. *Craig*, 207 F. 2d 888, 891, opinion by Judge Maris on November 27, 1953, that "Registrants are not thus to be treated as though they were engaged in formal litigation assisted by counsel."

Great emphasis was placed on the fact that Witmer changed his position three times before the local board in respect to making his claim for classification. The Selective Service regulations do not require a registrant to base his claim upon any one particular claim. Section 1623.2 of the regulations gives the registrant the right to make, and places the duty upon the local board to consider, any of 16 different classifications. The local board must classify the registrant in the lowest classification for which he is qualified. Section 1625.1(b) requires the registrant to notify the local board in writing of "any fact that might result in the registrant being placed in a different classification such as, but not limited to, any change in his occupational, marital, military, or dependency status, or in his physical condition."

A man may be a farmer, judge and a father. As a registrant he must file a classification questionnaire setting forth the truth as to his entire status. He must show the facts about his being a father. He must show the facts about his status as a judge. He must show the truth about his farming operations. The mere fact that a registrant may give the information about all this different status under the act does not mean that he has changed his position. He is merely telling the board all the facts. The registrant has only one hearing before the local board. He cannot allege one claim, then come back and make another, then come back and make a third and then have a hearing and personal appearance on each one. He must tell all the facts, and then his personal appearance requires the local board to consider *de novo* the entire case, including not only the farmer's classification but the claim for classification as a judge and as a father in the supposed case above stated. This illustration and analogy proves that

Witmer was not inconsistent when he stated to the board the truth about his being a minister, a farmer and a conscientious objector.—*Taffs* v. *United States,* 8th Cir., 1953, 208 F. 2d 329, 331.

It is submitted, therefore, that there is no basis in fact for the denial of the conscientious objector status by the appeal board.

TWO

The act and regulations do not permit the Department of Justice to recommend, or the appeal board to accept the recommendation, that willingness to work on a farm and produce food to assist in the war effort is basis in fact for the denial of the conscientious objector status.

Section 6(j) of the act (50 U. S. C. App. § 356(j), *supra,* p. 2) provides for the appropriate inquiry and hearing in the Department of Justice. The act and the regulations provide for the recommendation by the Department of Justice to the appeal board following the hearing before the hearing officer. (Section 1626.25 of the regulations, *supra,* p. 6) The act and the regulations, therefore, make the inquiry, the hearing and the recommendation of the Department of Justice to the appeal board a statutory and vital link in the chain of administrative proceedings. The consequence of this is that it is necessary that the proceedings in the Department of Justice be in accordance with law and that they do not conflict with and defy the law.

Petitioner submits that the Department of Justice misinterpreted Section 6(j) of the act. It is to be observed that Congress did not confine the conscientious objections to "war in any form" but extended it to direct participation. Congress did not imply that a conscientious objector who was not opposed to employment in defense work was not a conscientious objector. It is participation in war in any form that is the subject matter of the statutory provision for the conscientious objector. Nothing can be found in the act or the regulations or in the legislative

history that indicates anything to the effect that if a person is willing to do a certain type of work he cannot be considered a conscientious objector having conscientious scruples to participation in war in any form even though he is willing to perform secular defense work as a means of employment. If the unreasonable interpretation placed upon the act by the trial court and the appeal board is accepted it will authorize an unending and uncontrollable scope of inquiry. Every type of work and act that may be conceivably thought of can be relied upon to determine and deny the conscientious objector status.

Congress did not intend to allow an inquest to be held as to the kind of work that a registrant did or was willing to do. Congress intended to protect every person who has conscientious objections, based upon religious grounds, to participation in war in any form. Congress did not make the factors relied upon by the trial court and the local board in this case any basis in fact for the denial of the conscientious objector claim.—*United States* v. *Wilson*, 7th Cir., 1954, 215 F. 2d 443, 446; *Hinkle* v. *United States*, 9th Cir., Sept. 24, 1954, — F. 2d — ; *Franks* v. *United States*, 9th Cir., Oct. 4, 1954, — F. 2d — ; *Goetz* v. *United States*, 9th Cir., Oct. 14, 1954, — F. 2d — .

The opinions of the courts below are based on an unreasonable interpretation of Section 6(j) of the act extended to forfeit the status if the objector is willing to engage in "indirect participation." The proper interpretation of the act should limit consideration to participation in military service with the word "direct." If consideration of work that the objector is willing to do is not limited to direct participation but extends to indirect participation, then the conscientious objector can be denied his status unless he refuses to do anything in any way indirectly contributing to the war effort. In time of total war every civilian is indirectly geared to and participating in the war effort whether he likes it or not. The argument of the Government and the construction placed upon the act by

the court below completely nullify the provisions of the act that conscientious objectors do civilian work contributing to the war effort. Congress did not intend to be so unfair or unreasonable.

The holding of the court below is subversive of the intention of Congress. It ignores completely the criterion of opposition to participation in the armed forces. The Government injects the vague and indefinite dragnet of opposition to war into the statute, nullifying completely the plain purpose of Congress in passing the law.

In making the law Congress was dealing only with raising an army. Exemption from becoming a soldier was given to many different classes of registrants who contributed to the war effort. The performance of a certain type of work outside the army deferred most of the ones excused from training and service. Pursuit of the vocation of minister is an outstanding exemption. Farming, essential work in the national defense industry and service to the state or federal governments in different capacities are the most common exemptions. The status of severe hardship and conscientious objection are other deferments not based on occupation or work.

The deferred status of hardship or conscientious objection does not at all depend on the type of work that the registrant is willing to perform, whether in a defense plant or not. The statute nowhere makes the kind of work done by a registrant claiming deferment as a conscientious objector before induction an element to consider. The only time that the type of work performed or willing to be performed by a conscientious objector is material (and then it is after induction, and not work before induction that is involved) is when it is shown that he performs combatant service or is willing to perform combatant service. Then and only then can it be said that the service performed or willing to be performed by the registrant disproves conscientious objection to service.

It is true that Congress classified the type of work that a conscientious objector can be drafted to do. It is anything that contributes to the health, safety and welfare of the nation. So long as it is of a civilian nature it must be done when ordered by the draft board to be done by the conscientious objector under the act. What is there in the act or the regulations to prevent a draft board from ordering a conscientious objector to do work in a war plant? Nothing! Concerning the similar provision for work by conscientious objectors under the 1940 act it is said ". . . that the Act did not even guarantee that the objector would not be assigned to do work connected with the war effort." (Sibley and Jacob, *Conscription of Conscience,* Cornell University Press, Ithaca, New York, 1950, p. 50) Since a conscientious objector could be ordered to do work of a civilian nature contributing to the national welfare in a defense plant, then how can the Government now say that because a man says he is willing to do work in a war plant he is not a conscientious objector? The argument of the Government is incongruous and leads to unreasonable and harsh results.

Congress has required direct and indirect participation by conscientious objectors by the law. This is required of the two classes of conscientious objectors. One classified in I-A-O as a conscientious objector must go into the army, wear a uniform and directly participate by performing all kinds of military service except combat duty. The other is required to participate indirectly by doing civilian work contributing to the national health, safety and welfare. These are the only words of Congress on the type of work to be done by conscientious objectors. Congress did not go outside the boundaries of the law and legislate on the type of work done by the conscientious objector before he is inducted into service. It is therefore entirely irrelevant, immaterial and improper for the courts below to amend the law by now doing what Congress has not done. It is for Congress to take the step the court has taken. Since Con-

gress has not taken the first step, the courts below cannot step in and take the leap Congress has not permitted them to take.—*United States* v. *Wilson,* 7th Cir., 1954, 215 F. 2d 443, 446.

The holding of the courts below is inconsistent with the act itself. Section 6(j) of the act (*supra,* p. 2) provides for the classification as conscientious objectors of persons who are willing to go into the armed forces and do non-combatant military service. The argument that one who is willing to contribute something to the war effort is not a conscientious objector is inconsistent with the act itself. This Court rejected the specious and factitious position of the Government and the courts below in *Girouard* v. *United States,* 328 U. S. 61 (1946), 68-69. Modern-day total war is designed to be implemented by a conscription system that gears the total population for contribution either directly or indirectly to the war effort of the nation. Since the very act that provides for the conscientious objector classification also provides for the conscientious objector to contribute something toward the war effort, the argument of the Government and the courts below flies in the teeth of the act.

Petitioner submits that the Government and the courts below have misinterpretated Section 6(j) of the act (*supra,* p. 2). It is to be observed that Congress never extended conscientious objections to mere objection to "war in any form." Congress did not say that a conscientious objector who was not opposed to employment in defense work was not a conscientious objector. It is direct *participation* in war in any form that is the subject matter of the statutory provision for the conscientious objector. Nothing whatever is said in the act or the regulations or in the legislative history that indicates anything to the effect that if a person is willing to do a certain type of work he cannot be considered a conscientious objector having conscientious scruples to participation in war in any form, even though

he was willing to contribute indirectly by defense work as a means of employment. If the unreasonable interpretation placed upon the act by the courts below is accepted it will authorize an unending and uncontrollable scope of inquiry. Every type of work and act that may be conceivably thought of can be relied upon to determine and deny the conscientious objector status.

It is entirely irrelevant and immaterial to hold that there was basis in fact because Witmer was willing to assist in the war effort by farming. This was not an element to consider and in any event it was no basis in fact, according to the law, for the denial of his claim. It did not impeach or dispute in any way what he said in his questionnaire and conscientious objector form, all of which was corroborated by the FBI report. The law does not authorize the Department of Justice to invent fictitious and foreign standards and use them to speculate against evidence and facts that are undisputed.—*Annett* v. *United States,* 10th Cir., 1953, 205 F. 2d 689, 691; *Hinkle* v. *United States,* 9th Cir., Sept. 24, 1954, — F. 2d — ; *Clementino* v. *United States,* 9th Cir., Sept. 27, 1954, — F. 2d — ; *United States* v. *Alvies,* N. D. Cal. S. D., 1953, 112 F. Supp. 618, 620, 623-624; *United States* v. *Graham,* W. D. Ky., 1952, 109 F. Supp. 377, 378; *United States* v. *Everngam,* D. W. Va., 1951, 102 F. Supp. 128, 130-131; *Dickinson* v. *United States,* 346 U. S. 389, 396-397, 399 (1953); *United States* v. *Hartman,* 2d Cir., 1954, 209 F. 2d 366, 369, 371; *Schuman* v. *United States,* 9th Cir., 1953, 208 F. 2d 801, 802, 805; *Weaver* v. *United States,* 8th Cir., 1954, 210 F. 2d 815, 823; *Lowe* v. *United States,* 8th Cir., 1954, 210 F. 2d 823; *United States* v. *Lowman,* W. D. N. Y., 1954, 117 F. Supp. 595, 598; *United States* v. *Benzing,* W. D. N. Y., 1954, 117 F. Supp. 598.

The question of employment and work performed by one who claims to be a conscientious objector becomes material only when the type of work done or agreed to be done by the conscientious objector is in the armed forces.

In passing the Selective Service Act of 1948 (as amended) the Congress of the United States provides for two kinds of conscientious objectors. One is a person who has objections only to the performance of combatant service. He is recognized as willing to wear a uniform and do anything in the armed forces except kill or bear weapons. This type of conscientious objector does not have his conscience questioned because of the type of work he is willing to perform, even though it may be in the armed forces. No board or official of the government may deny a registrant his conscientious objector claim to the I-A-O classification (limited military service as a conscientious objector opposed to combatant military service only) because of his willingness to perform noncombatant service in the armed forces, thus helping the armed services do a job of killing.

It is submitted, also, that the conscientious objector to both combatant and noncombatant military service ought not to be denied his conscientious objector classification because of the kind of work he is doing outside the armed services. The law disqualifies no one on such ground. It seems that a reasonable interpretation of the act and the regulations would not make the type of employment that a registrant is willing to do relevant so long as it does not involve combatant or noncombatant military service.

That Witmer may have been willing to work on a farm does not in any way constitute basis in fact for the I-A classification. That classification still remains arbitrary and capricious. There is nothing in the act or the regulations that authorizes the draft board to order a man to do combatant military service because he is willing to work on a farm.—*Clementino* v. *United States,* 9th Cir., Sept. 27, 1954, — F. 2d — ; *United States* v. *Wilson,* 7th Cir., 1954, 215 F. 2d 443, 446; *Goetz* v. *United States,* 9th Cir., Oct. 14, 1954, — F. 2d — ; *Franks* v. *United States,* 9th Cir., Oct. 4, 1954, — F. 2d — .

During the Civil War the provost marshal general was authorized to grant special benefits to noncombatants under Section 17 of the act (approved February 24, 1864). President Lincoln was urged to force conscientious objectors into the army. He replied:

> "No, I will not do that. These people do not believe in war. People who do not believe in war make poor soldiers. . . . These people are largely a rural people, sturdy and honest. They are excellent farmers. The country needs good farmers fully as much as it needs good soldiers. We will leave them on their farms where they are at home and where they will make their contributions better than they would with a gun."—Selective Service System, *Conscientious Objection,* Special Monograph No. 11, Vol. I, pp. 42-43, Washington, Government Printing Office, 1950.

The act and the regulations are specific as to what constitutes a conscientious objector to both combatant and noncombatant military service. Nowhere in the act or in the regulations is there any basis for the assertion that performance of work on a farm allows the draft board to classify a registrant as a combatant soldier. As long as a registrant can prove that he has conscientious objections to military service, he is entitled to the conscientious objector classification. This is true regardless of what sort of work he does. Whether he contributes directly or indirectly to the war effort is entirely immaterial as long as the work is not military service.

If the position be upheld that one who performs work that directly contributes to, and indirectly participates in, the war effort is not entitled to the conscientious objector status, then it will become impossible for any conscientious objector ever to get the classification. Even a person who pays income tax or other tax to the federal government is participating both directly and indirectly in the war effort. The money that he pays in taxes is used for the financing

of the military machine of this nation. Congress did not intend to forfeit the conscientious objections on such a vague and indefinite basis. Congress defined a conscientious objector. As long as a person meets that definition and fits the statute and regulations, the fact that he might do work of any sort is wholly irrelevant and immaterial.

The argument of the Government in defiance of the intent of Congress by a strange and unreasonable interpretation of the act now would force all conscientious objectors to go on a sit-down strike and do absolutely nothing, either directly or indirectly, that might contribute to the war effort in order to preserve the freedom from participation in the armed forces granted to them by Congress.

The recommendation of the Department of Justice here, therefore, that Witmer should be ordered to do combatant military service in the armed forces because he had worked on a farm is illegal, arbitrary, capricious and contrary to the act.

THREE

The local board deprived petitioner of his rights guaranteed by Section 1624.2 of the Selective Service Regulations by considering the case as out of its hands and by refusing to reopen the case and reclassify petitioner upon his personal appearance.

Petitioner was told by the local board that because he had appealed his case no action would be taken on his personal appearance. [R. 4-10, 13] it was the policy of the board not to reopen and reclassify any registrant on personal appearance, as required by law, when no new evidence was presented. [R. 4-7, 10] This process followed by the local board was in defiance of the Selective Service Regulations.—32 C. F. R. § 1624.2(b) and (c) (*supra*, p. 5)

The holding of the court below on this question ignores completely the importance of the maintenance of procedural due process of law in Selective Service cases. It should be

remembered that the scope of review in Selective Service cases as far as the classification is concerned is limited and restricted. (*Estep* v. *United States,* 327 U. S. 114, 121-122 (1946)) The rule of administrative law is that in cases where the review is restricted there must be a strict compliance with the requirements of procedural due process by the administrative agency.—See *N. L. R. B.* v. *Cherry Cotton Mills,* 5th Cir., 1938, 98 F. 2d 444, 446.

It has been uniformly held that for the final order to report for induction to be valid in Selective Service cases it must appear that the local board has strictly complied with the procedural requirements of due process of law. —*Ver Mehren* v. *Sirmyer,* 8th Cir., 1929, 36 F. 2d 876, 881; *United States* v. *Zieber,* 3rd Cir., 1947, 161 F. 2d 90, 92; Ex parte *Fabiani,* E. D. Pa., 1952, 105 F. Supp. 139, 147-148; *United States* v. *Graham,* N. D. N. Y., 1952, 108 F. Supp. 794, 797; *Bejelis* v. *United States,* 6th Cir., 1953, 206 F. 2d 354, 358.

In *United States* v. *Hufford,* M. D. Pa., 1952, 103 F. Supp. 859, 861, the court said:

> "If the board did not fully and fairly comply with the provisions of the Act and the applicable regulations, the registrant was under no duty to comply with the order."

The effort on the part of the trial court to simulate this case to *Martin* v. *United States,* 4th Cir., 1951, 190 F. 2d 775, certiorari denied 342 U. S. 872 (1951), and to distinguish it from the holding in *United States* v. *Stiles,* 3rd Cir., 1948, 169 F. 2d 455, proceeds on a fundamentally erroneous basis. The confusion demonstrated by the trial court may perhaps fog up the view of the law so that the Court will miss the point unless there is a clarification.

The entire basis of the holding below can be briefly stated. It is: Witmer had notice of what took place upon the occasion of the personal appearance. Because he had actual notice of the proceedings there was a waiver of

the violations of the law by the local board and Witmer cannot now complain about these violations.

The undisputed evidence shows that the local board defiantly refused to reopen the case and consider it entirely anew. The local board merely stated that the new evidence did not show Witmer was entitled to the ministerial exemption. The board then refused to reopen, declaring that the original classification stood. This was not a *de novo* consideration of the case. Admittedly there is no evidence in the record before this Court that the case was reopened as required by Section 1624.2(b) and (c) of the regulations. The record shows to the contrary. It cannot be argued that because the board considered the IV-D claim there was a *de novo* consideration. Nowhere in the record does it appear that the local board reopened the entire case. Nowhere does it appear that on the personal appearance the local board considered the conscientious objector form. Nowhere in the record does it appear that the local board considered the farmer's classification. The only claim that was mentioned was the minister's claim, but even then the very memorandum in which it is mentioned shows that the board did not reopen the old classification, as it was required to do. It merely ordered the old original classification to stand without any reclassification as required by Section 1624.2(c) of the regulations.

It is obvious that the local board defiantly violated Section 1624.2(c), refused to conduct a *de novo* hearing upon the personal appearance and refused to consider all the claims for classification and reclassify Witmer, "in the same manner as if he had never before been classified," as required by Section 1624.2(c).

The trial court merely argued that because Witmer was given actual notice of this procedural violation of his rights by the local board this was equivalent to the legal notice of legal procedure required by Section 1624.2(c). Actual notice of the illegal refusal to reopen the case and reclassify Witmer was not notice of reclassification on per-

sonal appearance, required by Section 1624.2(d). That section of the regulations says that the board shall mail the registrant notice of classification. Since there was no reclassification upon personal appearance the giving of actual notice of the determination of the local board not to reopen cannot be argued or found to be "Notice of Classification" required by Section 1624.2(d).

In order for the notice of action by the local board to be good and legal the action taken by the local board upon personal appearance must be legal action itself. There must be a reopening of the classification and a reclassification as required by Section 1624.2(c) of the regulations. Illegal action and notice of such illegal action are not equivalent to the legal action required by the regulations and notice of such legal action.

Actual notice, even though not in writing, of proper legal action makes harmless the failure to give written notice required by the regulations. (*Martin* v. *United States,* 4th Cir., 1951, 190 F. 2d 775) But where there is illegal action the actual notice thereof does not make the illegal action legal or validate the invalid proceedings.

If the holdings below are to be approved, then it will be the end of procedural due process of law. A tribunal could deny procedural due process upon a hearing and then notify a party of such illegal denial. According to the Government's argument the giving of actual notice of such denial of procedural due process constitutes a waiver of it. This extreme position taken by the Government the law of the land rejects. The position of the Government in this case is subversive of the maintenance of due process of law and standards of strict compliance with the procedural requirements of law.

The position of the petitioner in answer to the holding made by the trial court on this point can best be proved by an illustration. Suppose in a hypothetical case involving judicial proceedings the law made mandatory the granting of a new trial whenever requested by the losing party. This

unusual supposition for judicial proceedings is identically the same as that provided for in Section 1624.2(c) of the regulations in effect on January 22, 1951. In such a hypothetical case the failure and refusal of the court to grant and conduct a new trial made mandatory in the hypothetical case would be a denial of due process of law. Purely because the court in the hypothetical case notified the litigant that there would be no *de novo* hearing on the new trial would not cure the error in failing to conduct a new trial properly, enter a new judgment and give notice of entry thereof. The same violation of procedural due process is apparent here in this case.

The testimony given by the clerk, which is relied upon by the trial court, supports the undeniable contention that the local board refused to reopen the case. The clerk said that the board told Witmer that his case was out of their hands because he had taken an appeal. This conclusively shows that the board refused to consider the case entirely *de novo* as required by the regulations. [R. 4, 5-7, 10]

The Government's reliance upon other oral testimony given by the clerk does not support the position taken by the Government. Nowhere does the clerk testify that the board reopened and reconsidered the case on the personal appearance. Any argument that the Government makes that the testimony of the clerk of the local board can overcome, alter, change or add to the memorandum by the local board upon the personal appearance should be rejected. The court below in *United States* v. *Hufford,* M. D. Pa., 1952, 103 F. Supp. 859, 862, held that the testimony of a clerk could not be relied upon to add to or take from any written local board records.

Extensive argument was made by the Government in the court below that because the local board told Witmer that the evidence he offered to them on personal appearance "was not sufficient to warrant a IV-D classification" this was sufficient and equivalent to a reopening and reclassification upon personal appearance. If this stood alone,

then perhaps something could be said for it in favor of the Government. But the other records indicate to the contrary. The other records show that there was no *de novo* consideration. Additionally, the most that can be said for this entry in the memorandum is that the local board on personal appearance considered only the one claim, namely, the ministerial exemption. It shows that the board did not consider the farmer's classification and the conscientious objector's classification upon personal appearance. The failure of the local board to consider the conscientious objector form upon personal appearance is conclusive proof that there was failure to reopen and reconsider the case as required by Section 1624.2(c).—See *Knox* v. *United States,* 9th Cir., 1952, 200 F. 2d 398, 401-402.

The Government relies upon *Martin* v. *United States,* 4th Cir., 1951, 190 F. 2d 775, and *Atkins* v. *United States,* 10th Cir., 1953, 204 F. 2d 269. The facts in both those cases show an entirely different situation from the facts that exist in this case on the personal appearance. In both those cases the only claim made by the registrant was the ministerial claim. No conscientious objector claim was made. There was no other claim for classification made. When the boards considered only the ministerial claim in the *Martin* and *Atkins* cases they considered the entire case. Here, however, there was more involved in the case than the ministerial claim. It was the duty and responsibility of the board to pass upon the conscientious objector claim and the farmer claim. Neither of these claims was passed upon or considered. Moreover, the *Martin* and *Atkins* cases are distinguishable for other reasons. It appears from the opinions of the courts in both those decisions that each local board did actually reopen the case and consider the classification entirely anew. Martin was actually reclassified on the personal appearance and placed in Class I-A. Atkins, while not reclassified, was notified that his claim for exemption as a minister had been denied and that the old classification would be continued. Therefore, there was an actual

reopening of the cases by the local boards. But such was not done in this case. Therefore, the doctrine of *United States* v. *Stiles*, 3rd Cir., 1948, 169 F. 2d 455, 458-459, applies here and should be enforced rather than the rule of *Martin* v. *United States*, 4th Cir., 1951, 190 F. 2d 775.

There is a plain distinction apparent on the face of the *Stiles* and *Martin* opinions. The *Martin* opinion shows that the registrant was actually reclassified *de novo* and on personal appearance the local board reclassified him I-A. The memorandum of the local board quoted from in the opinion of Judge Parker shows that the "registrant is continued under Class I-A." The board there did not refuse to take any action as the record showed in the *Stiles* case. In the *Stiles* case (3rd Cir., 1948, 169 F. 2d 455, 456-457) the opinion shows that after the registrant appealed on January 21, which was following his letter requesting a personal appearance on January 17, a hearing was held on February 4. Stiles appeared and gave evidence. The *Stiles* opinion goes on to point out that following the personal appearance the board did not again classify him or send another notice but "on the next day sent his file to the board of appeal which classified him I-A."

The single narrow question involved in the *Stiles* decision was "whether under the Selective Service Regulations a local board is required to classify a registrant anew after his personal appearance before the board even though he presents no new information to the board when he appears before it." This language is taken from the *Stiles* opinion, 169 F. 2d, page 457. The court below went on to hold that "the furnishing of new information" is not made "a condition precedent to such classification anew and it thus appears that it is to be done after reconsideration of the information already in the file in the light of the registrant's oral discussion of it and of his claim for reclassification even though he has furnished no new information." —169 F. 2d, p. 458.

The facts in the case at bar are also distinguishable from the *Martin* facts (4th Cir., 1951, 190 F. 2d 775) while the facts in the *Stiles* case are identical to the facts in this case. In the case at bar and in the *Stiles* case there was no *de novo* classification as there was in the *Martin* case. There was no continuance of classification ordered. The board in the *Stiles* case, as well as the board in this case, considered the case to be *out of its hands* because of the prior notice of appeal. The files in both cases were sent to the boards of appeal without a new I-A classification by the local board, which was given upon the personal appearance in the *Martin* case. This distinction was apparently recognized by this Court in the denial of the petition for writ of certiorari in the *Martin* case (342 U. S. 872) that was based on the ground that there existed a conflict.—See also *United States* v. *Fry,* 2d Cir., 1953, 203 F. 2d 638, 640.

Under the decision in the *Martin* case the failure to mail a classification card was held to be harmless error because of the actual notice of reclassification given to the appellant in that case. There was oral notice also given in this case. But the notice was not of a reclassification. Petitioner was notified that no action was going to be taken on this classification. This was not a notice of reclassification contemplated by the regulations and the opinion of the court below in the *Stiles* case. It is the lack of notice of *reclassification* that aggravates the error of the board in failing to consider the case *de novo.* Notice of any other thing by the local board is not sufficient. The local board was required by the regulations to give a certain kind of notice. It was notice of reclassification. No such notice was given. The notice of no action taken did not comply with the regulations. Until there was a new classification and a notice in writing of the new classification the local board had no authority to order the appellant to report for induction. —*United States* v. *Graham,* N. D. N. Y., 1952, 108 F. Supp. 794, 796-797.

In the *Stiles* case the court below said:

> "Moreover the order for his induction was in direct violation of § 625.3 since it was issued after he had requested a personal appearance but before notice of his classification anew had been mailed to him as required by § 625.2 (d). It follows that the induction order was invalid and that Stiles, having exhausted his administrative remedies, was entitled to set up its invalidity in his defense. His motion for a judgment of acquittal should, therefore, have been granted."—169 F. 2d, page 459.

The action of the local board is illegal, because when it entertained petitioner's application for a personal appearance as a matter of law the entire proceedings were stayed and nullified until such time as the petitioner had received a classification card. The local board not having mailed him a reclassification card following his personal appearance, the entire action taken by the local board and the board of appeal was *ultra vires* and contrary to the regulations. —*United States* v. *Graham, supra.*

It is said that since the petitioner had already filed a notice of appeal it was unnecessary to give him a new notice of classification following his personal appearance and, accordingly, the oral notice given by the local board upon the occasion of the personal appearance was adequate and sufficient.

The filing of a double request—for a personal appearance and appeal—has caused confusion for some time. Under the present regulations the Director of Selective Service has given some help. The boards are directed as to how to deal with this situation. In Local Board Memorandum No. 52, issued January 14, 1953, among other things, he says:

> *"2. When personal appearance is a procedural right.*—. . . (d) Frequently, after classification by the local board and within 10 days after the mail-

> ing of the Notice of Classification (SSS Form No. 110), registrants will request a personal appearance and also appeal to the appeal board. In such a case, the fact that an appeal has also been taken does not deprive the registrant of his procedural right of personal appearance. The local board must give the registrant an opportunity to appear. If the local board determines not to reopen the registrant's classification after the personal appearance, the registrant's file must be forwarded to the appeal board without further action on the part of the registrant since he has already appealed from that classification. If the local board reclassifies the registrant after the personal appearance, his file need not be forwarded to the appeal board unless he thereafter appeals from his new classification."

In Paragraph 2(b) of the above local board memorandum General Hershey says further:

> " . . . It is important that the required notice and advices be mailed promptly by the local board since the right to appeal may continue indefinitely unless they are mailed."

The *de novo* consideration and the *de novo* classification are jurisdictional. The fact that the registrant may have notice of the violation of the regulations that makes "its action . . . lawless and beyond its jurisdiction," as stated in *Estep* v. *United States*, 327 U. S. 114, 121 (1946), does not cure the want of jurisdiction any more than notice of the refusal to "reopen on the written request of the State Director a registrant's classification," which was stated in the *Estep* opinion to make the determination lawless, would cure the want of jurisdiction in such a situation. The mailing of the classification card following personal appearance and the new classification are equivalent to the requirement of the entry of a written judgment in a court of law. No

lawyer or judge would have the audacity to contend that an oral opinion expressed by a judge from the bench constituted the written judgment of the court or the docket entries that make up a record in a case. This situation is analogous here. No amount of oral notice cures the violation of the regulations by the local board.—See *United States* v. *Graham*, 108 F. Supp. 794, 797.

As to the argument that failure to give written notice is harmless, the Court is referred to the language in *Smith* v. *United States*. 4th Cir., 1946, 157 F. 2d 176, 182. There the local board failed to reduce to writing and prepare a written summary of the facts considered by the local board in making its classification. The Government argued that the failure to comply with the regulations was harmless error in view of the fact that the defendant had the right to make a written statement or summary himself upon the appeal to the appeal board.—See also *Niznik* v. *United States.*, 6th Cir., 1949, 173 F. 2d 328.

The error here is grievous and fundamental. It prejudiced the petitioner's rights. It is unlike the harmless error in the *Martin* case. There the court held that in a case where there was a full compliance with the personal appearance regulation (except for the giving of written notice of the new classification) it was harmless because Martin was told by the board when he was called back five minutes after the new classification what it was. Also, later the clerk of the board read the memorandum of the action of the board to him. We have no situation of a substantial compliance with the board here. Here was a rank and complete omission to follow the necessary steps required by the Selective Service Regulations. What the court below said in the last paragraph of its opinion in *United States* v. *Zieber*, 1947, 161 F. 2d 90, 93, is still the law today and applies here.

In *United States* v. *Strebel*, D. Kan., 1952, 103 F. Supp. 628, 631, the court refused to extend the doctrine of the *Martin* case and chose to follow the *Stiles* case. There no

new classification notice was mailed after the board decided to let the original classification "drift along." This is the situation here.—See also *United States* v. *Graham,* N. D. N. Y., 1952, 108 F. Supp. 794.

The United States District Court for the Eastern District of Pennsylvania in Ex parte *Fabiani,* E. D. Pa., 1952, 105 F. Supp. 139, held that a liberal and scrutinous review of draft board classifications is demanded under the 1948 and 1951 draft acts and that the courts are not required to follow the stricter view adhered to under the 1940 act.

In a consideration of the Selective Service Regulations the Court ought to be careful not to confuse the regulations in force at the time of the progress of the petitioner's case through the local board with the regulations amended at a later date. This danger was called to the attention of the trial court and he avoided the pitfall but fell into the well on a decision of the case on other points. See the transcript of the testimony for the effect of the change in the amendments and the inapplicability of the new regulations.

Under the new regulations it is not necessary to reclassify unless new and additional evidence, sufficient to justify a change in classification is given. If the new evidence is sufficient, then the classification is reopened and the registrant is then classified anew. There must, however, even under the new regulations, be a written notice of the action taken by the local board. See Section 1624.2(c) and (d) as amended by Executive Order of the President No. 10,292 on September 25, 1951, which was after the date of the personal appearance of the petitioner in this case.

The trial court made a point about the petitioner's making a double-barreled complaint of the classification by the local board in that he requested an appeal and a personal appearance in the same letter. This was the same situation in the *Stiles* case. Before the personal appearance Stiles had requested both a personal appearance and an appeal.

A cursory consideration of the facts might lead one to the conclusion that the board was confused by the action.

This is a common procedure followed by registrants. (See Local Board Memorandum No. 52, issued January 14, 1953, *supra*, p. 56) The practice is due to the printed notice appearing on the original classification card mailed to all registrants. (SSS Form No. 110) The notice reads:

> "Appeal from classification by local board must be made within 10 days after the mailing of this notice by filing a written notice of appeal with the local board. Within the same 10-day period you may file a written request for personal appearance before the local board."

The above form has in the same paragraph a notice that says if the request is made the time to appeal is extended ten days from the mailing of the new notice following personal appearance. Section 1606.51 (of which the Court can take judicial notice) makes the form a part of the Selective Service Regulations.

It is seen that if any confusion was caused the board, it was set in motion by the provisions of the Form No. 110 used by the board. The petitioner, being a layman and unlearned in the law, cannot be judged on the basis that he was skilled in the knowledge of the regulations. He could have gotten by with a request for personal appearance but this was not plainly called to his attention on the card. The language of the card is ambiguous. A registrant reading the words would very easily take the two courses of making a dual request in order to play safe and not lose his rights. In any event the taking of the appeal simultaneously with requesting the personal appearance does not forfeit the rights of personal appearance. The fact that it was granted put the duty on the board of proceeding as though he had not mailed the notice of appeal.—See Local Board Memorandum No. 52, issued January 14, 1953, *supra*, p. 56.

The undisputed evidence shows that the board considered that the case was out of its hands upon the personal appearance. [R. 4, 5-7, 10] The hearing was a sham and a

shell because of his misinterpretation of the law. [R. 4, 5, 6-7, 8, 10, 13] If they considered and honored his request to the point of notifying him to appear for a personal appearance it was their duty to consider his arguments, his statements and his evidence. The rejection of these because the case was out of the hands of the board constituted a denial of a full and fair hearing.

There is an opinion of the court below directly in point on this question. It is *United States* v. *Zieber,* 1947, 161 F. 2d 90.—See also *Bejelis* v. *United States,* 6th Cir., 1953, 206 F. 2d 354, 356-358.

The right of a full and fair hearing is guaranteed by the regulations. The rights of the registrant upon a personal appearance are explicitly set forth in Section 1624.2(b).

It is obvious that the purpose of the regulations was to afford the registrant a full and fair hearing. The right to a personal appearance is an important one. The petitioner in this case, as a registrant, was entitled to be heard in person. It is fundamental that a personal appearance before a tribunal deciding any matter at issue is absolutely essential to insure justice and proper administration of law. In fact, the matter of personal appearance is recognized by the judiciary as being an indispensable factor of equal justice under law in the trial courts. It is fundamental that the appellate courts always yield to the finding of the trial court or jury upon issues of fact, because the trial court is in a better position to judge the matter that is at hand than the appellate court, inasmuch as the trial court has the advantage of the personal appearance of the litigants and witnesses. Indeed it would be a rank departure from due process of law were a trial court to refuse to permit parties or witnesses to make a personal appearance before the court. It is the purpose of the law to insure to litigants the right of personal appearance before tribunals, judicial or administrative.

The purpose of the regulations providing for personal appearance was to guarantee the rights of registrants to

procedural due process of law and to a full and fair hearing. These regulations cannot be circumscribed by arbitrary actions or wanton disregard for the rights of registrants or a mere desire to be free of a vexatious problem and to pass it on to a higher tribunal.

It certainly will be conceded that in judicial proceedings there would be a violation of procedural due process were the trial judge to deny the right of the litigants to appear personally and to force them to submit their case upon affidavits. The right to such a personal appearance would be defeated and frustrated in such an instance. While there is no constitutional guarantee of the right of a personal appearance before an administrative tribunal, if the regulations provide for the right of a personal appearance before such tribunal the personal appearance cannot be denied. If it is refused, then that constitutes a violation of procedural due process.

In this case the action of the local board was tantamount to a denial of the right of a personal appearance. The local board illegally regarded that the petitioner had appealed his case to the appeal board. The personal appearance before the local board was a hollow formality. Concededly the local board failed to consider the evidence of the petitioner. This was not a hearing upon a personal appearance of the type required by law. (*Bejelis* v. *United States*, 6th Cir., 1953, 206 F. 2d 354, 356, 358) "If one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given."—*Morgan* v. *United States*, 298 U. S. 468, 480-481 (1936).

The local board's action in arbitrarily and capriciously refusing to give petitioner a full and fair hearing comes squarely within the statements allowing judicial review of draft board determinations in Ex parte *Stanziale*, 3rd Cir., 1943, 138 F. 2d 312.

In *Estep* v. *United States*, 327 U. S. 114 (1946), the Supreme Court held that draft board determinations and rul-

ings were final only when they were made in conformity with the law and the regulations. The Court mentioned a few of the violations of the rights of registrants that would constitute a violation of procedural due process. The Court then added: "In all such cases its action would be lawless and beyond its jurisdiction."—327 U. S., page 121.

In *United States* v. *Zieber,* 3rd Cir., 1947, 161 F. 2d 90, 93, the Government contended that honest, good-faith mistakes of a draft board in the denial of procedural due process constituted harmless error. This Court rejected this argument.

This regulation was considered by the United States District Court for the Southern District of New York in *United States* v. *Romano,* 1952, 103 F. Supp. 597.

In *United States* v. *Peterson,* N. D. Cal. S. D., 1944, 53 F. Supp. 760, the defendant requested a personal appearance. There, as here, it was granted. There the defendant appeared and his case was heard while he sat in an anteroom. In that case the hearing was denied completely in the presence of the defendant when he appeared.—See also *United States* v. *Laier,* N. D. Cal. S. D., 1943, 52 F. Supp. 392.

It is plain, therefore, that the local board did not carry out the burden placed upon it by Section 1624.2(b) and (c) of the regulations. The board did not consider the case *de novo* but refused to reopen the case and reclassify petitioner, because he did not offer any new evidence. (*United States* v. *Stiles,* 3rd Cir., 1948, 169 F. 2d 455) This deprived petitioner of his rights to procedural due process of law upon personal appearance.

CONCLUSION

It is submitted that this Court should hold that the draft board order made the basis of the prosecution is void. The reasons are (1) there was no basis in fact for the denial of the conscientious objector status, (2) the recommendation by the Department of Justice that willingness to assist in the war effort by working on a farm was basis

for the denial of the conscientious objector status and (3) the local board denied petitioner his rights guaranteed by Section 1624.2(b) and (c) of the Selective Service Regulations. Therefore, the judgment of the court below should be reversed and this case remanded to the district court with directions to enter a judgment of acquittal.

Respectfully submitted,

HAYDEN C. COVINGTON

124 Columbia Heights
Brooklyn 1, New York

Counsel for Petitioner

November, 1954.

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Supreme Court of the United States

OCTOBER TERM, 1954

No. 164

PHILIP ANDREW WITMER,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

HAYDEN C. COVINGTON
124 Columbia Heights
Brooklyn 1, New York
Counsel for Petitioner

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Supreme Court of the United States

OCTOBER TERM, 1954

No. 164

PHILIP ANDREW WITMER,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

MAY IT PLEASE THE COURT:

The reply of the petitioner will take up the different points of respondent's brief in the order in which they appear therein.

I.

The questions presented (page 2, respondent's brief) are unduly limited. The respondent entirely ignores the violation of procedural due process of law by the illegal rec-

ommendation of the Department of Justice to the appeal board. Regardless of whether there was basis in fact for the denial of the conscientious objector status this Court must determine whether the recommendation of the Department of Justice violated petitioner's rights, contrary to the statute and regulations.

II.

The second question (page 2, respondent's brief) is too narrow and restricted. The issue is not alone whether the board failed to give full consideration to the case. There is an additional problem involved also, which is *whether the local board refused to reopen and consider the case de novo* as required by the regulations.

III.

The emphasis placed by respondent upon the claim for agricultural classification (page 3, respondent's brief) is irrelevant to the issues. A registrant can claim different classifications at different times. It has been held that "successive deferments may be claimed on different grounds."—*Taffs* v. *United States,* 8th Cir., 1953, 208 F. 2d 329 (No. 576, October Term, 1953; cert. denied 347 U. S. 928 (1954)).

IV.

Emphasis is placed (page 4, respondent's brief) on the questions appearing in Selective Service Form No. 150 (special form for conscientious objector). The respondent has printed the instructions and the sections of the conscientious objector form that Witmer refused to sign. It quotes, also, his alternate statement. prepared in lieu of signing Series I(A) or I(B). The law did not require Witmer to sign the conscientious objector form in order to make his claim. (See Local Board Memorandum No. 41, appearing on page 38 of the main brief for petitioner.)

The statement (top of page 4, respondent's brief) signed by Witmer was sufficient to present the conscientious objector claim.

The special form for conscientious objector was amended, eliminating the parts of the form to which Witmer objected. In the new instructions the statement about the understanding of the registrant was eliminated. The new Series I, SSS Form No. 150 (revised April 22, 1952), reads as follows:

"Series I.—CLAIM FOR EXEMPTION

"INSTRUCTIONS.—The registrant must sign his name to either statement A or statement B in this series but not to both of them. The registrant should strike out the statement in this series which he does not sign.

(A) I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form. I, therefore, claim exemption from combatant training and service in the Armed Forces.

_____

(Signature of registrant)

(B) I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form and I am further conscientiously opposed to participation in noncombatant training and service in the Armed Forces. I, therefore, claim exemption from both combatant and noncombatant training and service in the Armed Forces.

_____

(Signature of registrant)"

The reason for this change was that difficulty was encountered with conscientious objectors because of the use of the word "understand" in the Series I in the old form. Many conscientious objectors, like Witmer, refused to sign such statement.—*United States* v. *Clark,* W. D. Pa., 1952, 105 F. Supp. 613.

V.

Respondent emphasizes (page 5, respondent's brief) the failure of petitioner to give "public expression" to his conscientious objector views. Failure to give public expression to one's private conscientious objections is no basis for a denial of the claim. The answer that Witmer made to this question (page 5, respondent's brief) does not at all dispute the sincerity of his claim. Elsewhere his papers showed that he preached publicly as one of Jehovah's Witnesses. What he meant when he answered this question was that conscientious objection is a personal matter with him upon which he did not make public talks from the platform. The question itself is a very ambiguous one. Therefore, the answer should not be taken here as the Government would like to have the Court take it. Registrants are not to be dealt with as though they were litigants represented by counsel. —*Berman* v. *Craig,* 3rd Cir., 1953, 207 U. S. 888, 891.

VI.

Respondent attempts to develop inconsistency on the part of petitioner (respondent's brief, page 6). On March 19, 1951, petitioner presented an affidavit of the city servant of Jehovah's Witnesses showing that he had been distributing literature since 1942. Then it is stated that petitioner was not baptized until September 23, 1951. His activity in the organization before baptism or ordination on September 23, 1951, was as a student preparing for the ministry, or as a regular minister.

VII.

It is stated (bottom of page 6, respondent's brief) that petitioner presented *The Watchtower* of February 1, 1951, to the local board at the time of his personal appearance. This is a misstatement. The February 1, 1951, issue of *The Watchtower* accompanied and was a part of the conscientious objector form filed with the local board in February, 1951. [R. 23, 26]

VIII.

The respondent (page 7, its brief) deals with the summary of the personal appearance as though it were a memorandum of reasons. Under Section 1624.2(b) of the regulations the summary is to be made of the evidence and does not relate to the reasons of the board for classification. The summary referred to (top of page 7) is printed in full at pages 13-14 of petitioner's main brief.

IX.

The statement concerning the testimony of the board clerk and the action taken by the board upon personal appearance is not entirely accurate (respondent's brief, pages 7-8). The Court should read the testimony of the clerk and consider the minutes of the board as well as the memorandum dictated by the chairman. The memorandum dictated by the chairman shows that the classification was not reopened and that the case was not considered *de novo*. [R. 22-34, 54-55]—See pages 13-14 of petitioner's main brief.

The official minutes of the local board show, also, that there was no reopening and consideration of the case. The official minutes read: "3-19-51 Board met with registrant. No action taken (see note in file)." [R. 21] The reference "(see note in file)" refers to the memorandum dictated by the chairman of the board, appearing at pages 13-14 of the petitioner's main brief. Both the minutes and the mem-

orandum show that the case was not reopened. This is in accordance with the testimony of the clerk that it was the policy of the board, when no new evidence was presented, not to reopen the case and not to consider the classification *de novo* as provided by the regulations. [R. 4, 5 7, 10]

The entire testimony of the clerk should be considered. [R. 4, 5, 6-7, 8, 10, 13] It is significant that the trial judge, in finding against petitioner, did not find that the case was reopened and that the matter was considered *de novo.* [R. 54-55]

It is also significant that no new classification was mentioned in the minutes or the memorandum dictated by the chairman of the local board. Failure of the local board to reclassify the petitioner upon the personal appearance proves that the case was not reopened and was not considered *de novo.*

X.

In footnote 6 (bottom of page 8, respondent's brief) criticism of Witmer by innuendo appears. It is stated that it was "not unnatural to prefer a deferment easier to obtain." It is not only natural, but also provided by the regulations that a registrant be classified in the lowest class. (See Section 1623.2 of the Selective Service Regulations.) The fact that Witmer attempted to get the best classification possible is not illegal.—*Taffs* v. *United States,* 8th Cir., 1953, 208 F. 2d 329; cert. denied 347 U. S. 928 (1954).

XI.

It is irrelevent and immaterial that petitioner spoke of his intention to become a full-time farmer and to have the full vocation of a minister, as emphasized on page 9 of respondent's brief. The law allowed him to make such claim. (Section 1623.2) He was obliged to show the local board any change in his draft status from time to time. See Section 1625.1(b); see *United States* v. *Vincelli,* 2d Cir., 1954, 215 F.

2d 210, rehearing denied with opinion, Nov. 9, 1954, 218 F. 2d 681.

XII.

On page 9 in the summary of argument the statement is made that the issue is not whether Witmer was denied his conscientious objector claim because of his willingness to work on the farm and contribute to the war effort. It is stated that "nothing of the kind appears in the record." This statement is challenged as being inaccurate. The issue is stated that it was whether one who was not a full-time farmer, and who was urging his wish to contribute to the war effort by becoming a full-time farmer, is sincere. What the Government says (at the bottom of page 9) is not clear, and when all is said and done it means the same thing that the Government contends at the beginning of the summary of argument (page 9).

XIII.

The summary of the argument of the Government overlooks completely the issue of the violation of petitioner's rights to procedural due process of law. The recommendation of the Department of Justice that Witmer be denied his conscientious objector status because of his willingness to farm and help the war effort "proceeded upon an inadmissible hypothesis," as held by the United States Court of Appeals for the Ninth Circuit in *Shepherd* v. *United States*, No. 14,105, Dec. 13, 1954, — F. 2d —. In that case the Ninth Circuit concluded: "We think that a hearing before a department proceeding upon an erroneous theory as to what constitutes objection to 'participation in war in any form,' is no better than no hearing at all."

Even though it be conceded for the sake of argument that there was basis in fact for the classification, nevertheless there has been a violation of procedural due process of law that the Government chooses to ignore.

XIV.

It is stated by the respondent (bottom of page 11 and top of page 12) that Witmer "is a sincere Jehovah's Witness." Yet (top of page 14) it is stated by the Government that both the local board and the Department of Justice were unwilling "to rely upon petitioner's sincerity." This concession and this statement are inconsistent. How can a man be conceded to be a sincere Jehovah's Witness and, at the same time, it be argued that there was basis in fact for a finding of insincerity? It is impossible to understand this type of hot-and-cold argument.

XV.

The Government argues (pages 12-13) that it was the nature of Witmer, which is the beliefs of Jehovah's Witnesses, that fails to show that he was conscientiously opposed to war. Reference is made to the respondent's brief in *Sicurella* v. *United States*, No. 250, this term. In response to this argument petitioner adopts the argument appearing in the reply brief for petitioner in the *Sicurella* case, No. 250, this term.

And it should be remembered that neither the Department of Justice nor the appeal board relied upon the petitioner's religious beliefs as the basis for denial of his conscientious objector status. It requires speculation on the part of the Court to say that this was relied upon by the appeal board. It is to be presumed that the appeal board relied upon the grounds stated in the recommendation of the Department of Justice. In relation to the appeal board the Department of Justice stands in the position of a judge to the jury in a general charge. It must be presumed that the grounds relied upon in a general verdict are all the grounds stated in the general charge. So it is here. All the grounds stated by the Department of Justice must be considered as having been relied upon.—*Stromberg* v. *California*, 283 U. S. 359 (1931); *Terminiello* v. *Chicago*, 337 U. S. 1 (1949).

XVI.

It is stated (bottom of page 13, respondent's brief) that "at all stages of the administrative process" it was found that petitioner lacked genuine objections to participation in war. Not only did the hearing officer dissent, but, also, there is evidence that the local board did not even pass upon the conscientious objector claim. This obviously was never considered by the board, at least upon Witmer's personal appearance. The case was not reopened. Petitioner was reclassified, and the memorandum of the local board shows that the conscientious objector claim was not even mentioned. It is difficult to conceive how it can be argued that this was considered by the local board. [R. 21, 33-34] The only claim that was considered was the ministry claim, and even then this claim was not used as the basis for reclassification. The local board merely considered the claim to determine whether to reopen or not. It did not consider the claim for the purpose of reclassification.

XVII.

The recommendation of the Department of Justice is relied upon as basis in fact because petitioner was willing to contribute to the war effort by farming. (See the brief, page 14.) It is said that willingness to contribute to the war effort is diametrically opposed to "abhorrence of war." To begin with, there is nothing said in the statute about abhorrence of war. The only thing prohibited by the statute is direct participation in war. A conscientious objector can be willing to forward the war effort indirectly and still not lose his status.

It is argued that a true objector does not "do something which he considers to be a contribution to the war effort." This is unreasonable and contrary to the act, which requires conscientious objectors to participate in the war effort indirectly by civilian work contributing to the national welfare.—See *United States* v. *Wilson*, 7th Cir., 1954, 215 F. 2d 443; *Franks* v. *United States*, 9th Cir., 1954, 216 F. 2d

266; *Clark* v. *United States*, No. 14,176, 9th Cir., Dec. 3, 1954, — F. 2d —; *Goetz* v. *United States*, 9th Cir., 1954, 216 F. 2d 270; compare *White* v. *United States*, 9th Cir., 1954, 215 F. 2d 782.

XVIII.

The statement made (footnote 9, page 14) is altogether unreasonable. To state that it is illegal for a conscientious objector to say that he is willing to contribute to the war effort and that the only persons that can speak of a contribution to the war effort are ones favoring war makes no sense. This type of argument reminds counsel of the charge given by the district court to the jury that a conscientious objector could not be believed because he was not worthy of credibility. (*Smith* v. *United States*, 4th Cir., 1946, 157 F. 2d 176) This type of argument means that a conscientious objector is barred from defending his position or even indicating that he is a good citizen. It means that the conscientious objector must remain silent and take a position of sabotage in order to get recognition under the law. This argument is absolutely ridiculous.

XIX.

Respondent argues (page 15) that there is a distinction between a conscientious objector who renders intentional assistance to the war effort and one who renders unintentional assistance to the war effort. It is stated that if a conscientious objector assists unintentionally, then he may be considered as conscientious. This means that it is impossible for a conscientious objector to be conscientious and not be *unconscious*. He must be out of his mind and must not understand the effect of his acts. It is impossible for this type of argument to be understood. It is beyond the realm of reality and outside the reach of reasonableness. Even he who performs civilian work contributing to the war effort indirectly as a conscientious objector when ordered to do so by his local board knows that he is contributing to the war effort,

and this contribution is intentional even though under the orders of the Government. The argument of the Government would prohibit a conscientious objector from acceptance of national civilian work. This argument is an absurdity.

XX.

As the second basis in fact relied upon by the Department of Justice and the respondent for the denial of the conscientious objector claim and the affirmance of the judgment of the court below, it is stated that petitioner was inconsistent because, after advancing his farmer's claim, he claimed to be a minister. (Page 15) Then again it is stated (page 15, footnote 11) that he failed to sign the conscientious objector form. It is stated that the failure to sign the form is not "among the items 'believed to be incompatible with a sincere conscientious objector claim.'" If this is the position of the respondent in this case, then why was it necessary to quote the conscientious objector form in full (footnote 1, page 4, respondent's brief)?

Concerning the argument about seeking the farmer's classification and the minister's classification, this point has been argued previously in this reply brief, where comment was made about respondent's statement of the facts about these two claims.—See pages 2, 6-7, *supra*; see also *Pine* v. *United States,* 4th Cir., 1954, 212 F. 2d 93; *Cox* v. *Wedemeyer,* 9th Cir., 1951, 192 F. 2d 920.

XXI.

At page 16 of the respondent's brief there appears extensive argument about the memorandum made by the local board. It should be remembered that what was considered by the local board and all that the local board talked about in its memorandum on personal appearance [R. 33-34] was the ministerial claim. It did not deal with the conscientious objector claim. It is immaterial, therefore, to talk about the board's finding a lack of sincerity based upon his ministerial claim.

If the local board denied him this classification because he made it in short sequence after making the farmer's claim, then the local board has defied the law and the regulations.—See the argument made, *supra,* pages 6-7.

That the registrant had the right to make several claims successively, see *Taffs* v. *United States*, 8th Cir., 1953, 208 F. 2d 329; cert. denied 347 U. S. 928 (1954); Section 1625.1 (b), Selective Service Regulations.

Since it was lawful to make these claims and unlawful for the local board to deny them because they were made in quick sequence in time, there was no basis in fact or law for the argument appearing on page 16 of respondent's brief.

The position respondent takes on the making of successive claims is unreasonable. The making of successive claims does not prove insincerity. There is a difference between evasion and avoidance of a duty. It is lawful to avoid. It is illegal to evade. The local board did not find that Witmer was evading a duty. Witmer had the right to try to get a lower classification than he had received. Indeed it was his duty to do so. Because he tried to get a lawful lower classification and failed does not legally establish that he was insincere. All Witmer did was take advantage of the rights accorded him under the law. Surely this ought not to spell insincerity or hypocrisy. His sincerity may have driven him to make such claims, and still it is legal to do so. Such argument made by the respondent penalizes an entirely innocent registrant for taking advantage of his rights. Nowhere in the act or in the regulations is it provided that if a person claims more than one classification at one time and fails on any claim he be regarded as insincere. Since there is no such provision in the act or regulations it is beyond the competency of the Department of Justice or the respondent in this case to rely upon petitioner's making the claims successively.

There have been many cases where it has been established that a registrant may change his claim even after clas-

sification.—*Dickinson* v. *United States*, 346 U. S. 389 (1953); *Hull* v. *Stalter*, 7th Cir., 1945, 151 F. 2d 633; *United States* v. *Vincelli*, 2d Cir., 1954, 215 F. 2d 210, rehearing denied with opinion, Nov. 9, 1954, 216 F. 2d 681; *United States* v. *Graham*, W. D. Ky., 1952, 109 F. Supp. 377.

The law allows such procedure. Since it is permitted by law, then how can the Government contend that it is basis in fact for denial of the conscientious objector status?

It is plain, therefore, that both grounds relied upon by the Department of Justice and the respondent as basis in fact for the denial of the conscientious objector status are without basis in law.

Why would the Government, under Section 1625.1(b), provide for the change of classification and at the same time provide penalties under the law for conscientious objectors who have invoked such procedure? Would not this be discrimination of the worst sort to penalize the conscientious objector for invoking these regulations, at the same time putting the procedure in the regulations to be made available? Certainly the President did not intend to use Section 1625.1(b) as a booby trap for conscientious objectors. To accept the Government's argument on this point as basis in fact would be nothing less than to do this.

It is utterly unreasonable to assume that the law intended that a conscientious objector be given the right to show a change in status, such as occupational or other status that would exempt him, and then penalize him if he failed to succeed in his effort to show a change in status.

XXII.

It is argued (page 17, respondent's brief) that the Court is not to weigh the evidence but is to consider petitioner's "inconsistencies and evasions." To begin with, there is no weighing of the evidence in this case. All the evidence is undisputed and there are no inconsistencies and evasions. Petitioner was straightforward and gave honest answers. Neither the Department of Justice nor the local board ques-

ed the credibility of the petitioner. The local board ed to make a memorandum of any lack of credibility on part of the petitioner.—*Williams* v. *United States*, 5th ., 1954, 216 F. 2d 350; *Pitts* v. *United States*, 9th Cir., 14,164, Dec. 7, 1954, — F. 2d —; *Ashauer* v. *United tes*, 9th Cir., No. 14,304, Dec. 21, 1954, — F. 2d —.

Since neither the local board nor the Department of tice questioned the truthfulness of the petitioner's state- its, then having "searched the record for some affirm- e evidence to support the Local Board's overt or implicit ing that defendant had not painted a complete or accu- picture of his activities, none has been found."— *ted States* v. *Fair*, W. D. Pa., 1954, 122 F. Supp. 666; also *Dickinson* v. *United States*, 346 U. S. 389, 396-397.

The statements made by the respondent about "incon- encies and evasions" and "conflicting utterances" con- ute mere name-calling and an attempt to picture peti- er falsely to this Court, contrary to law (page 17 of ondent's brief). It is, therefore, entirely erroneous for respondent to say that the issue here is "nothing more an attempt to dispute the weight" of the evidence. Also, statement made by respondent that this is a plea to this rt to find that the administrative officers "should not have elieved petitioner" (page 18, respondent's brief) is a representation. To begin with, no one disputed peti- er. Petitioner does not contend that there is a weighing he evidence. The evidence is undisputed. The question whether the local board acted beyond its jurisdiction use there was no basis in fact for the denial of the cientious objector status.—*Estep* v. *United States*, 327 . 114 (1946).

It is stated without basis (page 18, respondent's brief) "petitioner's own conduct, before the selective service rd" was a basis for a finding of insincerity. There was mproper or illegal conduct. As pointed out, all he did invoke the legal remedies available to him. Because he a conscientious objector and invoked these remedies

to avoid service it is charged that he was insincere. This is unreasonable and discriminatory.

XXIII.

In an attempt to distinguish the *Dickinson* case (346 U. S. 389 (1953)) it is stated: "[t]his Court found these facts uncontroverted" in the *Dickinson* case. The same situation exists here. The facts showing the conscientious opposition to military service are established by the uncontroverted evidence. It is therefore proper for this Court to state here "that the facts could not be disbelieved without further factual support for the disbelief." (See page 18 of respondent's brief.) Many courts have held that the doctrine of *Dickinson* v. *United States*, 346 U. S. 389 (1953), applies in cases where the conscientious objector status has been established by the undisputed evidence. This is established by the decisions cited on page 20 of petitioner's main brief. To this list should be added *Ashauer* v. *United States*, 9th Cir., No. 14,304, Dec. 21, 1954, — F. 2d —; and *Pitts* v. *United States*, 9th Cir., No. 14,164, Dec. 7, 1954, — F. 2d —.

XXIV.

It is argued (page 19) that "inner belief" is involved and subjective issues are presented that are within the jurisdiction of the draft boards alone. This argument has been disposed of in the main brief for the petitioner in *Simmons* v. *United States*, No. 251, this term, at pages 34-37.

If the Government's argument on this point is accepted in conscientious objector cases, then it will mean that there will be absolutely no review whatever for a conscientious objector in court. If he is classified I-A, then never, under any circumstances, would it be possible for the courts to upset an arbitrary and capricious classification because it was without basis in fact. The question of "inner belief" is present in every conscientious objector case. The argument of the Government is very specious and discriminates against conscientious objectors. Why should the court pro-

cedure be different in the case of the conscientious objector from that of the case of any other registrant on trial before the district courts of the United States or before the courts of appeals or even the Supreme Court of the United States? There is no reason for this distinction.

What the respondent is attempting to do here is to get this Court to make a holding that will result in the same situation as at the beginning, prior to "equal justice under law." What the Government is trying to do is push this Court back into the mire that existed in conscientious objector cases during World War II. During that period of time it was considered that there was no defense for prosecutions for refusal to submit to induction for conscientious objectors. (See the concurring opinion by Mr. Justice Frankfurter in *Estep* v. *United States,* 327 U. S. 114, 134 (1946).) Surely this Court is not to be lured, misled and ambushed by sophistry and led back into the recrudescence of the dark period of World War II, when over 4,000 of Jehovah's Witnesses were sent to prison because there was no judicial review in such cases. The subtle argument of the Government here, if accepted, would result in absolutely no judicial review in cases involving the conscientious objector status. Then all will have been in vain if the insidious suggestion of the respondent here is not rejected. *Estep* v. *United States,* 327 U S. 114 (1946); and *Gibson* v. *United States,* 329 U. S. 338 (1946), would mean nothing. Those decisions will have been overruled, and that is exactly what some prosecutors and the Department of Justice have stated: that they are waiting until this Court reverses present law and puts them back into the pleasant situation they were in during World War II, when no defenses were permitted in these prosecutions.

This Court ought to ponder the effect of accepting the designing argument of respondent. It would be most unreasonable and unfair to hold that conscientious objectors

have no right to contest an arbitrary and capricious classification in the courts.

XXV.

At the bottom of page 19 and the top of page 20 respondent speaks about certain undisputed facts. With these petitioner agrees. They are undisputed. What petitioner cannot understand is why it is that in one breath (page 18) the respondent says that there is a weighing of the evidence and then again on these pages it is said that the facts are undisputed. How can undisputed facts involve weighing of the evidence? Weighing of evidence is involved only when there is some contradiction or dispute in the facts.

XXVI.

On page 21 respondent suggests that there should not be "the slightest diminution in judicial redress in case of a classification without basis in fact." It is impossible to reconcile this statement with all the points of argument made by respondent which, if accepted, would prevent the Court from ever holding that the denial of a conscientious objector status is without basis in fact. It is said in the next sentence (page 21) that if the no-basis-in-fact rule is applied in conscientious objector cases it would be having the courts to "second-guess the administrative board" that "actually saw the registrant." It should be remembered that the appeal board never saw the registrant. The Court should also bear in mind that unless the local board makes a memorandum of disbelief there is no question of credibility.—See the argument at pages 13-14, *supra.*

XXVII.

Heretofore in discussing the undue restriction of the questions presented (*supra,* pages 2-3) it was pointed out that the respondent has deliberately refused to meet

the issue of whether procedural due process has been denied by the appeal board acting upon the recommendation of the Department of Justice. It has been pointed out that when the Department of Justice makes an illegal recommendation to the appeal board and this recommendation is relied upon, there is error, calling for a remand of the case from the courts to the Selective Service System. This is argued extensively at pages 22-25 of the main brief for petitioner in *Gonzales* v. *United States*, No. 69, this term.

It has been pointed out that there must be strict compliance with the law because there has been a very narrow scope of judicial review established in these cases. (See the main brief for petitioner in the case, pages 25-26.) The courts have frequently held that recommendations of the Department of Justice proceeding upon an illegal theory, when relied upon, are basis for the reversal of a conviction based on an order issued upon the final classification.—*Shepherd* v. *United States*, 9th Cir., No. 14, 105, Dec. 13, 1954, — F. 2d —; *Clementino* v. *United States*, 9th Cir., 1954, 216 F. 2d 10; *Batelaan* v. *United States*, No. 13,939, 9th Cir., Dec. 17, 1954, — F. 2d —; *Affeldt* v. *United States*, 9th Cir., No. 13,941, Dec. 14, 1954, — F. 2d —; *Clark* v. *United States*, 9th Cir., No. 14,176, Dec. 3, 1954, — F. 2d —; *Goetz* v. *United States*, 9th Cir., 1954, 216 F. 2d 270; *Taffs* v. *United States*, 8th Cir., 1953, 208 F. 2d 329; *Annett* v. *United States*, 10th Cir., 1953, 205 F. 2d 689; *United States* v. *Bortlik*, M. D. Pa., 1954, 122 F. Supp. 225.

It has been plainly shown in petitioner's main brief in point two (pages 21-25) that the recommendation of the Department of Justice was illegal. It is submitted, therefore, that it would be highly unjust if this Court were not to pass upon the second question presented to this Court.—See petitioner's main brief, pages 10, 21-25, 41-48.

It cannot be argued that there were good parts of the

recommendation of the Department of Justice. This is like a general charge to a jury, resulting in a verdict of guilty. (See the argument above, page 8) It requires speculation on the part of the Court to say that the illegal recommendation of the Department of Justice did not affect the result of the proceedings before the appeal board. Since there was a denial of procedural due process in the use of the recommendation by the Department of Justice the case ought to be remanded for this reason alone.

XXVIII.

Respondent isolates only one prong of petitioner's contention that there was a violation of procedural due process upon petitioner's personal appearance before the local board. It is stated (page 22 of respondent's brief) that the contention of petitioner is that "the local board assumed that it was foreclosed from changing petitioner's classification because petitioner had included with his request for a personal appearance a request for an appeal." (See page 22 of respondent's brief.) This is not all that happened. This is only one feature of the evidence. What actually happened was that the local board refused to reopen the case because it was the policy of the board not to reopen and reconsider any case on a personal appearance unless sufficient new and additional evidence was offered to change the mind of the board. The memorandum of the local board shows conclusively that the local board refused to reopen and actually refused to and did not reclassify petitioner. (See the discussion of the evidence on this point, *supra,* pages 5-6.) It is said that the local board "went ahead with the personal appearance and with a decision." (See respondent's brief, page 22.) This is true so far as it goes. The board did go ahead, but when it went ahead the proceeding was a sham. The local board did not go ahead with the case open. The case was closed when it started. The case was still closed when the board

stopped. It reached a decision, but the decision was not in accordance with Section 1624.2(b) of the regulations. The board did not reclassify. It merely reached a decision not to reopen, which was in plain defiance of Section 1624.2(c) of the regulations. The regulations mandatorily required that the local board proceed with the hearing with the case wide open. The board, nevertheless, proceeded with the case shut tight, cut and dried, in plain defiance of the regulations.

XXIX.

The respondent relies upon the finding by the trial court on page 54 of the record. (See page 23 of respondent's brief.) The testimony of the clerk of the local board can be used to fill in blank spaces in the record, but the testimony of the clerk of the local board can never be used to contradict or to impeach the written records of the local board. The very trial court that decided this case so held in *United States* v. *Hufford,* M. D. Pa., 1952, 103 F. Supp. 859. In that case the same trial court as in this case said that finding that members of the local board discussed the matter is not a finding that the local board reopened the case and reclassified the registrant. The finding by the trial court that registrant was told that his I-A classification "would remain the same, his appeal would be honored" (page 23, respondent's brief) is not equivalent to a reclassification required by Section 1624.2(c) of the regulations following a reopening of the case and a reconsideration of the case *de novo.* (*United States* v. *Strebel,* D. Kans., 1952, 103 F. Supp. 628) It should be remembered that the memorandum dictated by the chairman of the local board and the official minutes of the local board show conclusively that the case was not reopened and there was not a reclassification. Now, how can it be argued in the face of the facts and in the face of *United States* v. *Hufford, supra,* that the trial court found that there was a reopening and reclassification? To the contrary, there is no such find-

ing. The trial court did not find that the local board reopened and reclassified. The so-called finding of the trial court in this case is significant for only one thing, its omission of fact, rather than its findings of fact. The trial court omitted to discuss the vital matter established by the undisputed records of the board, that the case was not reopened and that the petitioner was not reclassified.

The clerk of the local board testified: "when our Board does not reclassify or classify immediately a registrant who is 1-A at a personal appearance they will tell them at that time they will remain 1-A." [R. 6] She also said that Witmer was told the matter was "out of the hands of the local board because he had taken an appeal." [R. 6] Yet the Government states (footnote 14, page 24) that "nothing of the kind appears—petitioner was simply told, after personal appearance had been granted him and decision rendered, that his next step would be with the appeal board." This statement is not an accurate representation of the record, to say the least.

XXX.

It is stated (pages 24-25) that the board, upon Witmer's personal appearance, considered the conscientious objector claim. There is absolutely nothing in the record of the personal appearance to show that the conscientious objector claim was considered. The only question presented on the personal appearance was whether the board would reopen because of petitioner's ministerial claim. The record of the board relates only to the ministerial claim and does not extend to the conscientious objector claim.

XXXI.

It is argued that the petitioner's position boils down to a complaint against the board for not making an accurate record as an "experienced corporation counsel draws a set of corporate minutes." (See pages 26-27, respondent's brief.) This contention of the respondent certainly does

not fairly present petitioner's contention. Petitioner does not contend that the record of the board is inadequate. (*United States* v. *Zieber,* 3rd Cir., 1947, 161 F. 2d 90; *United States* v. *Garvin,* W. D. Pa., 1947, 71 F. Supp. 545) Petitioner's contention is that, using the records as they are drawn up, they cannot be impeached by oral testimony according to the trial court in this case. (*United States* v. *Hufford, supra*) The undisputed evidence shows that the local board defiantly refused to follow the procedure prescribed by Section 1624.2(c) of the Selective Service Regulations.

XXXII.

It is stated in footnote 15 (page 27) that petitioner has receded from his contention that the local board refused to reopen and reclassify. This assertion by the Government is absolutely wrong. Petitioner stands by every word that he said in the petition for certiorari and every word in the main brief on this subject.

The statement respondent makes in footnote 15 (page 27): "there was no refusal to reopen," is absolutely contrary to the record, as is shown by the memorandum dictated by the chairman of the local board and the minutes of the local board. Look at page 21 of the record. It says: "No action taken (see note in file)." [R. 21]

It is uniform procedure that when a draft board reopens a case upon registrant's personal appearance it makes the same entry as that which appears two lines above the entry for "3-19-51." [R. 21] Had the board reopened the case and reclassified, would it not have followed the procedure required by Section 1624.2(c) of the regulations and made an entry like that of "2-21-51," which reads: "Classified 1-A. Form 110 sent 2-22-51"?

It is clear that if the local board knew enough to make this sort of entry on "2-21-51" [R. 21] it had sense enough to do so on "3-19-51." It is not reasonable to say that it would take a corporation lawyer to know that the board

should write the same entry, if it were following the regulations, on "3-19-51" in the minutes. [R. 21] It is well known and lawyers of the Selective Service System and those of the Department of Justice must concede that it is the uniform practice required by Section 1624.2(c) of the regulations that, had the board followed that regulation, it would have in fact, without the aid of a corporation lawyer, written into the minutes "3-19-51 Reclassified I-A. Form 110 sent." Why is it now in the face of this uniform, well-established practice the Government has the audacity to contend before this Court that the local board complied with the regulations?

If this defiance of the regulations is a compliance with the regulations, then any violation of the procedural regulations can always be held to be a compliance. The position of the respondent makes a farce and a nullity out of law and procedural due process.

XXXIII.

It may be contended that the *de novo* classification by the appeal board cured the denial of a full and fair hearing upon petitioner's personal appearance before the local board. Petitioner had only one hearing before the local board. He had no personal appearance before the appeal board. It has been held that the reclassification upon appeal does not make harmless the denial of due process of law. —*Knox* v. *United States*, 9th Cir., 1952, 200 F. 2d 398; *United States* v. *Zieber*, 3rd Cir., 1947, 161 F. 2d 90; *United States* v. *Stiles*, 3rd Cir., 1948, 169 F. 2d 455; *United States* v. *Fry*, 2d Cir., 1953, 203 F. 2d 638; *United States* v. *Peterson*, N. D. Cal. S. D., 1944, 53 F. Supp. 760; *United States* v. *Laier*, N. D. Cal. S. D., 1943, 52 F. Supp. 392.

In *Franks* v. *United States*, 9th Cir., 1954, 216 F. 2d 266, 270, the court said:

> "Therefore a registrant who fails to have a fair chance for his proper classification on his appear-

> ance before the local board has been denied something which cannot be cured through the action of the appeal board. Such was our holding in *Knox* v. *United States*, 9th Cir., 200 F. 2d 398."

That he had a personal appearance and opportunity to discuss his claim before the hearing officer of the Department of Justice also is no cure of the prejudicial error in denying due process on his personal appearance before the local board.—*United States* v. *Fry*, 2d Cir., 1953, 203 F. 2d 638.

CONCLUSION

WHEREFORE, for the reasons above stated and for those appearing in the main brief for petitioner, it is submitted that the judgment of the court below should be reversed.

Respectfully,

HAYDEN C. COVINGTON

124 Columbia Heights
Brooklyn 1, New York

Counsel for Petitioner

January, 1955.

Brief for the U. S. in Opposition

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In the Supreme Court of the United States

OCTOBER TERM, 1954

PHILIP ANDREW WITMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SIMON E. SOBELOFF,
Solicitor General,
WARREN OLNEY III,
Assistant Attorney General,
BEATRICE ROSENBERG,
J. F. BISHOP,
Attorneys,
Department of Justice,
Washington 25, D. C.

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OPINIONS BELOW

The opinion of the District Court (R. 52-59) [1] is reported at 115 F. Supp. 19. The opinion of the Court of Appeals (R. 61-62) is reported at 213 F. 2d 95.

JURISDICTION

The judgment of the Court of Appeals was entered on May 13, 1954 (R. 62). On June 1, 1954, the time for filing a petition for a writ of certiorari was extended to June 30, 1954, by order of Mr.

---

[1] The designation "R." refers to petitioner's Appendix below, and the designation "Tr." to the original transcript of testimony, both on file with the Clerk of this Court.

Justice Burton (R. 63), and the petition was filed on June 24, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the denial by the Selective Service system of petitioner's claim of classification as a conscientious objector was without basis in fact.

2. Whether the Selective Service local board refused or failed to give full consideration to the case presented by petitioner at his personal appearance before the board.

STATUTE AND REGULATION INVOLVED

The pertinent portions of the Universal Military Training and Service Act, and Regulations issued thereunder, are set forth in the Appendix, *infra*, pp. 15-18.

STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals for the Third Circuit (R. 62) affirming the judgment of the District Court for the Middle District of Pennsylvania finding petitioner guilty of violating the Universal Military Training and Service Act, by refusing on December 5, 1951, to be inducted into the armed forces, and imposing a sentence of three years' imprisonment (R. 60).

Petitioner's record with the Selective Service system may be summarized as follows:

Petitioner was born on February 7, 1930 (R. 16) and filed his classification questionnaire, together with an explanatory letter, on January 31, 1951

(R. 16, 22). In the letter, petitioner stated that he was employed in a hat factory [2] and that he also operated a portion of his father's farm and intended to increase his farm work (R. 22-23). The letter closed with the following (R. 23):

> * * * It is my ambition to become a farmer and devote all my time to farming. For this reason I am appealing to you to grant me an agricultural classification as I assure you that I will increase production year after year, and contribute a satisfactory amount for the war effort and civilian use.

With respect to the information on "Minister, or Student Preparing for the Ministry", the questionnaire was marked, "Does not apply" (R. 18). However, petitioner signed the portion of the form in which conscientious objection to war is indicated (R. 20). In the special form for conscientious objectors, filed by him on February 5, 1951, he signed neither of the printed statements in Series I specifying objection to combatant service or to noncombatant service. [3] Petitioner appended a written statement "for section 1(B)" as follows (R. 27):

---

[2] This work averaged 40 hours per week (R. 18).

[3] This portion of the form was not printed in petitioner's Appendix below. The language, with the blanks left by petitioner at the places for signature, appears in the Government exhibit as follows:

"Series I.—CLAIM FOR EXEMPTION

"INSTRUCTIONS.—The registrant must sign his name to either statement A or statement B in this series but not to both of them. The registrant should strike out the statement in this series which he does not sign.

"(A) I am, by reason of my religious training and belief,

> My training and belief in relation to a Supreme Being involves duties superior to those arising from any human relation. This prevents me from turning aside from those superior duties which I owe to a superior Being.

Petitioner stated, *inter alia,* in other portions of the form, that both of his parents were Jehovah's Witnesses (R. 25), that he was instructed by them in the study of the Bible and in 1942 he himself "began to study the Bible with aid of the Watchtower" (R. 24), that he engaged in "Witnessing from door to door" from 1948 to date (R. 25), that he had "tried to tell others * * * of how [God] will put a stop to all wars" (R. 24), and that he "believe[d] in the use of force only at the command of Almighty God" (R. 24). He stated (R. 24):

> I am absolutely neutral toward the political disputes and the international controversies

---

conscientiously opposed to participation in war in any form. I, therefore, claim exemption from combatant training and service. I understand that if my claim is sustained I will be inducted into the armed forces but will be assigned to noncombatant service as defined by the President.

[Left blank.]
(Signature of Registrant)

"(B) I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form and I am further conscientiously opposed to participation in noncombatant training or service in the armed forces. I, therefore, claim exemption from combatant training and service and, if my claim is sustained, I understand that I will, because of my conscientious objection to noncombatant service in the armed forces, be deferred as provided in Section 6 (j) of the Selective Service Act of 1948.

[Left blank.]
(Signature of Registrant)

> and combats of this world. I take no active or violent part for either side, but pay my vows to God and always advocate his kingdom and way of salvation.

In response to the question whether he had "ever given public expression" to the views stated as the basis for his claim of conscientious objection, he wrote "No" (R. 24).

On February 21, 1951, petitioner was classified I-A (R. 21). He wrote to the local board that he was "a minister of the gospel" and wished to make a personal appearance to present evidence of "this fact" and to appeal from his classification.[4]

At his personal hearing before the board on March 19, 1951, petitioner presented an affidavit from the City Servant of his Company of Jehovah's Witnesses stating, *inter alia,* that petitioner had "on many occasions engaged in the preaching of the good news or gospel to others" (R. 28). He also presented a long typewritten statement of his own, asserting, *inter alia,* that he had begun "to carry Bibles and Bible study aids from door to door" in 1942 (R. 29); that to be ordained did not require attendance at a seminary or school (R. 30) or performing funeral or marriage ceremonies (R. 31) [5];

---

[4] The text of the letter is as follows (R. 27-28):

"On the strength of my right to appeal my service classification I wish to state that I am a minister of the gospel.

"On the strength of this fact I wish to appeal this classification and request a personal appearance to present evidence to this fact."

[5] But petitioner was not baptized until September 23, 1951 (R. 42).

that he engaged in secular work to permit him to engage in his ministry (R. 30); that his "weapons are not carnal" (R. 32); and (R. 32):

> The work that I now do is of greatest universal importance therefore I could not take part in a conflict of national or even international importance. If I would take part in such conflict I would not be keeping unspotted from the world, and I would therefore be breaking my covenant * * *.

The summary of the hearing, on record in the board's file, indicates that the chairman had commented concerning petitioner's termination of his employment of three years' standing at the hat factory two weeks after being classified I-A (R. 33); that petitioner stated that he intended to start getting his father's farm into shape, although that farm had not been worked as a farm for 23 years (R. 33-34); that the only evidence of petitioner's ministry was some paraphernalia from the Watchtower Society, and that petitioner asserted that Jehovah's Witnesses were ordained when they commenced distributing literature (R. 34). The summary concluded (R. 34):

> * * * The Board felt this was not sufficient evidence to warrant a 4-D Classification and informed the registrant his case would be sent up to the Appeal Board following his physical examination.

At the trial, in March 1952, the board clerk testified that after petitioner had been heard there was

discussion among the members of the board (Tr. 25) and that, at the end of the hearing the board chairman apprised petitioner that his I-A classification would remain the same and, upon physical examination, his file would be forwarded to the appeal board (R. 5-7).

Upon cross-examination by petitioner's counsel [6], the clerk testified to some language, suggested by petitioner's counsel as having been uttered to petitioner, as follows:

> Q. Isn't it a fact that at that time [when he was told he would remain I-A] Mr. Witmer was told the matter was out of the hands of the local board because he had taken an appeal?
>
> A. That is correct.
>
> Q. In other words, the local board could not do anything at that time because he had taken an appeal, isn't that what you told him or what the board chairman told him?
>
> A. Yes sir, that is correct. [R. 6.]

But the clerk recalled no such language at a time before petitioner entered the hearing room and the hearing and decision were completed (R. 10, Tr. 63). [7]

The appeal board forwarded the file to the De-

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[6] Apparently based upon the clerk's brief note on the back of the questionnaire "3-19-51 Board met with registrant. No action taken (see note in file)" (R. 5, 21).

[7] "Q. Isn't it also a fact that at that time they agreed that because of his appeal, the matter was out of their hands and they couldn't change his classification?

"A. That I don't remember."

partment of Justice on April 24, 1951 (R. 34-35). The hearing officer recommended classification of petitioner as a conscientious objector, relying upon petitioner's active participation as a Jehovah's Witness and concluding, with respect to petitioner's attempt to be deferred on other grounds, that "[i]t is not unnatural to prefer a deferment easier to obtain" (R. 36-39).

However, the Department of Justice did not concur in the hearing officer's recommendation. The Department, on October 18, 1951, pointed out that it was incompatible with sincere conscientious objection for a registrant to urge, as petitioner had urged, that he be permitted to increase his farming activity in order to contribute to the war effort (R. 35-36).

The appeal board, on November 2, 1951, unanimously classified petitioner I-A (R. 39). On December 5, 1951, he refused to be inducted (R. 48-50).

ARGUMENT

1. Petitioner contends that the denial of his claim to classification as a conscientious objector was arbitrary and capricious. The contention is advanced in general form by attempting to establish this case as similar in its facts to other decided cases (Question II, Pet. 3, 29-31) and, more specifically, by an attempt to present the decision below as having been based upon the single fact that petitioner engaged in farming which might indirectly assist the defense effort (Question I, Pet. 2-3, 22-29). But the essence of this case is not the fact

of petitioner's farming, nor was the case decided upon any such basis.[8] What was of significance here was that petitioner himself urged upon the local board his willingness and desire to "contribute" to the "war effort" by farming. Petitioner affirmatively sought an exemption upon the basis of contribution to the defense effort—an exemption diametrically inconsistent with one based upon abhorrence of war. Petitioner wrote to the board, "I am appealing to you to grant me an agricultural classification as I assure you that I will increase production year after year, and contribute a satisfactory amount for the war effort and civilian use." His letter urging the value of his farming to the defense effort is without parallel in the cases cited by him as being in conflict, and from this letter the Selective Service authorities clearly were entitled to conclude that petitioner was not sincere in claiming that he was conscientiously opposed to participation in war. The board's doubts of petitioner's general sincerity could find further support in his belated claim of a ministerial exemption upon a particularly skimpy record. There being a basis in fact for the denial of petitioner's claim, his classification is not to be

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[8] Petitioner's contention (Pet. 22) that the "courts below held that [registrants] could lose their conscientious objector status if they worked or were willing to work in a defense plant" is not only devoid of foundation, but is completely inapposite. The argument misconceives as a narrow, absolute rule what is actually a ruling that the entirety of a registrant's conduct may be weighed in judging his sincerity in claiming to be a conscientious objector.

set aside merely because another tribunal might have reached a different appraisal of the weight of the particular evidence before the board. *Estep* v. *United States*, 327 U. S. 114, 122-123; *Dickinson* v. *United States*, 346 U. S. 389, 394.

2. Petitioner contends that at the time of his personal appearance before the board there was a "refusal to reopen and reclassify" him (Pet. 4, 31-36). The contention is based upon a patent misconception of the facts.

The board in its written summary (R. 33-34), of record in the file, enumerated three new matters of fact presented at the personal appearance, i.e., that petitioner had left his work at the factory two weeks after being classified I-A; that petitioner, after his father's farm had not been worked for 23 years, now desired to get the farm "in shape"; and that petitioner now claimed to be a minister, adducing an ordination by the distribution of literature.[10] The board, of course, did not summarize mere reiterations of matter already presented, since the written summary, under the regulations, is only for "further information" presented at the personal appearance (Regulations, *infra*, p. 18). Similarly, the board having theretofore specifically passed upon two of the classifications urged upon it, i.e., agricultural worker and conscientious objector, and upon reconsideration

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[10] Petitioner was not baptized until half a year after this hearing (*supra*, p. 5).

finding nothing to warrant a different conclusion, restricted its specific written reference to the ministerial classification now claimed for the first time. Concerning this new claim, the board recorded its finding: "not sufficient evidence to warrant a 4-D Classification" (*supra*, p. 6).

Petitioner now seeks to adduce from this specific reference to the new claim, a complete *non sequitur* that the board considered nothing else (Pet. 33), and thereby seeks to develop a purported conflict with the earlier case of *United States* v. *Stiles*, 169 F. 2d 455, in the same circuit, in which a board had requested an affidavit from a registrant, informed him it "would be acted upon", and then never apprised him of the taking of any action.[11] However, in the instant case, the record discloses that petitioner presented a lengthy statement at the hearing in which he reiterated, *inter alia*, the basis of his conscientious objector claim (*supra*, pp. 5-6), and that, after petitioner had completed his presentation, the board members discussed the decision among themselves (*supra*, pp. 6-7). It is contrary to normal experience to assume that the board members mechanically screened out of their thoughts the agricultural and conscientious objec-

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[11] Petitioner strains his conclusion of fact that the board took no action, to the extent of asserting, *e. g.* "Nowhere in the record does it appear that the local board considered the farmer's classification" (Pet. 33), despite the fact that the summary itself reproduces petitioner's statement of his plan concerning farming.

tion classifications which were clearly within petitioner's presentation at the hearing.

Petitioner's entire present argument is simply a criticism of the failure of a board of laymen meticulously to put into writing every detail of deliberation and ultimate decision. The contention is aptly disposed of by the Court of Appeals below (R. 61), relying upon its *en banc* decision in the companion case of *United States* v. *Hagaman,* 213 F. 2d 86, in which the following appears (at p. 91):

> It is one thing, however, to protect a man when he is prejudiced by the failure of administrative authorities to observe the precautions taken to guard his rights. It is another thing to create an administrative procedure, designed to be handled by volunteer laymen in communities throughout the nation, as technical and ritualistic as common law pleadings. We have said in an earlier opinion that a registrant is not obliged to make his points with his draft board in the fashion required of a well-trained lawyer, *United States ex rel. Berman* v. *Craig,* 207 F. 2d 888 (C.A. 3, 1953). It is likewise true that the board's proceedings do not need to be recorded with the meticulous accuracy with which an experienced corporation counsel draws a set of corporate minutes.

There can be no real doubt from this record that all three of petitioner's claims for deferment or

exemption from military service were considered by the board, and that the board clearly decided and informed petitioner that his case merited none of such classifications.[12]

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[12] Petitioner's contrary contention (Pet. 4) that the local board thought that it was foreclosed, by petitioner's letter of appeal from reconsidering petitioner's classification, is based solely upon the alleged statement of the local board chairman, dubiously recalled by the board's clerk at the trial a year after the petitioner's personal appearance (see Statement, *supra*). Petitioner in another respect confuses the issue by asserting (Pet. 4, 32-33) that the Court of Appeals "held that because the local board told [petitioner] it was not going to reopen and reclassify, * * * such [notice] cured the deprivation of a right to a full and fair hearing." The Court of Appeals made no such holding. In the Court of Appeals, petitioner had made a further contention, now virtually abandoned (Petitioner's Br. below, pp. 1, 19-22), that because he was not served an additional written notice of his retention in classification I-A, he had been deprived of a right. The Court of Appeals approved the District Court's opinion, which pointed out, as held in *Martin* v. *United States*, 190 F. 2d 775, 779 (C.A. 4), certiorari denied, 342 U.S. 872, that the clear, personal notice to petitioner at the hearing, together with the perfecting of the appeal, precluded any prejudice to petitioner from the absence of a further written notice (R. 56, 59, 61-62). But the Court of Appeals at no time subscribed to the purported fact, now suggested by petitioner, that the board had not reconsidered petitioner's classification; the court approved, instead, a finding that there had been a true reconsideration, and a basis in fact for again holding petitioner to be in classification I-A (R. 56, 58-59; and see, specifically, the cases distinguished by the district court at R. 59, fn. 5).

CONCLUSION

The questions presented on the particular facts of this case were correctly decided below. No conflict of decisions is involved. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
J. F. BISHOP,
Attorneys.

JULY, 1954.

APPENDIX

Universal Military Training and Service Act, 62 Stat. 604, 612, 622; 65 Stat. 75, 86:

Section 6 (j) [50 U. S. C. App. 456 (j)]:

Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest

as the local board may deem appropriate * * *. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *. If after such hearing the Department of Justice finds that his objections are not sustained, it

shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. * * *

Section 12 (a) [50 U. S. C. App. 462 (a)]:

Any * * * person * * * who * * * refuses * * * service in the armed forces * * * or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

Selective Service Regulations, Title 32, C. F. R. (1949 ed.), Section 1624.2:

Appearance before local board. * * *

(b) At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he

believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing, or, if oral, shall be summarized in writing and, in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. * * *

(c) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board shall consider the new information which it receives and shall again classify the registrant in the same manner as if he had never before been classified.

(d) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board, as soon as practicable after it again classifies the registrant, shall mail notice thereof on Notice of Classification (SSS Form No. 110) to the registrant * * *.

(e) Each such classification shall be followed by the same right of appeal as in the case of an original classification.

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JOHN F. DAVIS,
Special Assistant to the Attorney General,
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I. F. BISHOP,
Attorneys,
Department of Justice,
Washington 25, D. C.

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tion was filed on June 24, 1954, and granted on October 14, 1954 (R. 79). The jurisdiction of this Court rests on 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether the denial by the Selective Service System of petitioner's claim for classification as a conscientious objector was without basis in fact.

2. Whether the selective service local board refused or failed to give full consideration to the case presented by petitioner at his personal appearance before the board.

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the Universal Military Training and Service Act, and Regulations issued thereunder, are set forth in the Appendix, *infra*, pp. 29-33.

STATEMENT

Petitioner was charged, in a one-count indictment returned on March 20, 1952, with refusal to be inducted, in violation of the Universal Military Training and Service Act (R. 3). Upon trial before a jury, petitioner was found guilty and sentenced to three years' imprisonment (R. 60). Petitioner did not contest the fact of his refusal to be inducted, or the denial of his claim for classification as a minister (R. 51-52). He contended that there was no basis in fact for denial of his claim for classification as a conscientious objector, and that the local selective service board, upon petitioner's personal appearance, did not consider new informa-

tion which he presented and did not accord him the required reclassification and notice thereof (R. 51-52). The Court of Appeals for the Third Circuit affirmed the conviction (R. 62).

Petitioner's record with the Selective Service System may be summarized as follows:

Petitioner was born on February 7, 1930 (R. 16). He filed his classification questionnaire, together with an explanatory letter, on January 31, 1951 (R. 16, 22), stating that he was employed in a hat factory 40 hours per week, and that he also operated a portion of his father's farm and intended to increase his farm work (R. 18, 22-23). In the letter petitioner expressed the ambition to devote all his time to farming, and closed with the following (R. 23):

> * * * For this reason I am appealing to you to grant me an agricultural classification as I assure you that I will increase production year after year, and contribute a satisfactory amount for the war effort and civilian use.

With respect to the information on "Minister, or Student Preparing for the Ministry", the questionnaire was marked, "Does not apply" (R. 18), but petitioner signed the portion of the form in which conscientious objection to war is stated (R. 20). In the special form for conscientious objectors, filed by him on February 5, 1951 (R. 23), he failed to sign the printed statements in Series I specifying objection to combatant service or to non-combatant

service.[1] Petitioner appended a written statement "for section 1(B)" as follows (R. 27):

> My training and belief in relation to a Supreme Being involves duties superior to those arising from any human relation. This prevents me from turning aside from those superior duties which I owe to a superior Being.

Petitioner stated, *inter alia,* in other portions of the form, that he was neutral in the controversies

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[1] The language of this portion of the form, with the blanks left by petitioner at the places for signature, appears in official *SSS Form No. 150* as follows:

"Series I.—CLAIM FOR EXEMPTION

"INSTRUCTIONS.—The registrant must sign his name to either statement A or statement B in this series but not to both of them. The registrant should strike out the statement in this series which he does not sign.

"(A) I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form. I, therefore, claim exemption from combatant training and service. I understand that if my claim is sustained I will be inducted into the armed forces but will be assigned to noncombatant service as defined by the President.

[Left blank.]
(Signature of Registrant)

"(B) I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form and I am further conscientiously opposed to participation in noncombatant training or service in the armed forces. I, therefore, claim exemption from combatant training and service and, if my claim is sustained, I understand that I will, because of my conscientious objection to noncombatant service in the armed forces, be deferred as provided in Section 6(j) of the Selective Service Act of 1948.

[Left blank.]
(Signature of Registrant)

and combats "of this world" and "I take no active or violent part for either side, but pay my vows to God and always advocate his kingdom and way of salvation" (R. 24). He believed in the use of force, however, "at the command of Almighty God" (R. 24). He reported that he had acquired his beliefs through instruction by his parents in the study of the Bible (both parents were Jehovah's Witnesses [R. 25]) and in 1942 himself "began to study the Bible with aid of the Watchtower" (R. 24).

In response to the question asking a description of the actions which "conspicuously demonstrate[d]" petitioner's depth of conviction, he replied that he had "tried to tell others about God's Kingdom, and of how he will put a stop to all wars" (R. 24). In response to the question whether he had "ever given public expression" to the views stated as the basis for his claim of conscientious objection, he wrote "No" (R. 24).

On February 21, 1951, petitioner was classified I-A (R. 21). He then wrote to the local board that he was "a minister of the gospel"—an exemption not theretofore claimed—and wished to make a personal appearance to present evidence of "this fact" and to appeal from his classification.[2]

At his personal appearance before the board on

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[2] The text of the letter is as follows (R. 27-28):

"On the strength of my right to appeal my service classification I wish to state that I am a minister of the gospel.

"On the strength of this fact I wish to appeal this classification and request a personal appearance to present evidence to this fact."

March 19, 1951, petitioner presented an affidavit from the City Servant of his Company of Jehovah's Witnesses saying, *inter alia*, that petitioner had "on many occasions" engaged in the "preaching of the good news or gospel to others." The affidavit contained no reference to any assertions concerning conscientious objection by petitioner (R. 28). Petitioner also presented a long typewritten statement of his own, asserting, among other things, that he had begun "to carry Bibles and Bible study aids from door to door" in 1942 (R. 29); that to be ordained did not require attendance at a seminary or school (R. 30) or performing funeral or marriage ceremonies (R. 31);[3] that he engaged in secular work to permit him to engage in his ministry (R. 30); that his "weapons are not carnal" (R. 32); and (R. 32):

> The work that I now do is of greatest universal importance therefore I could not take part in a conflict of national or even international importance. If I would take part in such conflict I would not be keeping unspotted from the world, and I would therefore be breaking my covenant * * *.

Petitioner also presented the entire issue of The Watchtower for February 1, 1951, largely devoted to articles stating the official position that the Jehovah's Witnesses are not pacifists, but nevertheless are conscientious objectors (R. 9).

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[3] But petitioner was not baptized until September 23, 1951 (R. 42).

The summary of the hearing, on record in the board's file, notes that the chairman commented concerning petitioner's termination of an employment of three years' standing at the hat factory two weeks after being classified I-A (R. 33); that petitioner stated that he intended to start getting his father's farm into shape, although it had not been worked as a farm for 23 years (R. 33-34); that the only evidence of petitioner's ministry was some paraphernalia from the Watchtower Society, and that petitioner asserted, in response to questioning, that Jehovah's Witnesses were ordained when they commenced distributing literature (R. 34). The summary concludes (R. 34):

> * * * The Board felt this was not sufficient evidence to warrant a 4-D Classification [Ministry] and informed the registrant his case would be sent up to the Appeal Board following his physical examination.

At the trial, in March 1952, the board clerk testified that at the end of the hearing the board chairman apprised petitioner that his I-A classification would remain the same and, upon physical examination, his file would be forwarded to the appeal board (R. 5-7).

Upon cross-examination by petitioner's counsel,[4] the clerk testified to some language, suggested by

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[4] Apparently based upon the clerk's brief note on the back of the questionnaire, "3-19-51 Board met with registrant. No action taken (see note in file)" (R. 5, 21).

petitioner's counsel as having been uttered to petitioner, as follows:

> Q. Isn't it a fact that at that time [when he was told he would remain I-A] Mr. Witmer was told the matter was out of the hands of the local board because he had taken an appeal?
>
> A. That is correct.
>
> Q. In other words, the local board could not do anything at that time because he had taken an appeal, isn't that what you told him or what the board chairman told him?
>
> A. Yes sir, that is correct. [R. 6.]

But the clerk recalled no such language at a time before petitioner entered the hearing room and the hearing and decision were completed (R. 10).[5]

The appeal board forwarded the file to the Department of Justice on April 24, 1951 (R. 34-35). The hearing officer recommended classification of petitioner as a conscientious objector,[6] but the De-

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[5] "Q. Isn't it also a fact that at that time they agreed that because of his appeal, the matter was out of their hands and they couldn't change his classification?

"A. That I don't remember.

* * *

"Q. As soon as the hearing was over, the board chairman made the statement which I quoted twice * * *.

"A. That is correct."

[6] He relied upon petitioner's active participation as a Jehovah's Witness and concluded with respect to petitioner's attempt to be deferred on other grounds, that "[i]t is not unnatural to prefer a deferment easier to obtain" (R. 36-39).

partment of Justice did not concur in the hearing officer's recommendation. The Department, on October 18, 1951, pointed out that it was incompatible with sincere conscientious objection for a registrant to urge, as petitioner had urged, that he be permitted to increase his farming activity in order "to contribute to the war effort." The Department further noted the inconsistency between petitioner's expression of an intent to become a full-time farmer and to have the full vocation of minister. (R. 35-36.)

The appeal board, on November 2, 1951, unanimously classified petitioner I-A (R. 39). On December 5, 1951, he refused to be inducted (R. 48-50).

SUMMARY OF ARGUMENT

I.

The issue in this case is not that urged by petitioner as to whether one who merely expresses willingness to work on a farm and thus indirectly to contribute to the war effort is, by that fact alone, deprived of the classification of conscientious objector. No such position is taken by the government and nothing of the kind appears in the record. What is involved is the far different fact that petitioner, who was not a full-time farmer, affirmatively urged upon the selective service board his wish to contribute "to the war effort" by becoming a full-time farmer, although he asked the selective service board to believe, at the same time, that he was conscientiously opposed, not just to

combatant service, but also to noncombatant service. The government contends that this affirmative statement of petitioner was clearly an element to be weighed in testing whether he truly entertained the deepseated religious objection necessary to exemption as a conscientious objector. The government's position is that the assertion of petitioner, together with other facts impugning petitioner's sincerity—all pointed out by the selective service board and the Department of Justice—was a matter to be weighed by the selective service appeal board and that the consequent disbelief of petitioner clearly was not so capricious as to require its being set aside by a court.

II.

Petitioner's assumption that the local selective service board failed to reconsider and reclassify him at the time of his personal appearance is a complete misconception of the record.

The statement and printed material which petitioner presented at the time of his appearance included specific and extensive argument for his classification as a conscientious objector, as well as his new claim of being a minister. There was discussion by the members of the board after the presentation and the chairman thereupon told petioner his classification would remain the same, *i.e.*, I-A, and that his concurrent appeal would be honored. There is no foundation for petitioner's present effort to adduce from the discussion of the appeal an impression that the board supposed that

by reason of the appeal it could not act with respect to the personal appearance. The board did go ahead with the full appearance by petitioner and it made its decision. Moreover, the board's written summary of the appearance shows that the board denied the new IV-D classification because there was "not sufficient evidence" and there was not a word in the summary about any supposed inability of the board to act. There is, moreover, no dispute but that petitioner, at the end of his appearance and after discussion by the board members, was immediately and personally told the decision, that his appeal proceeded in due and proper course, and that, pursuant to the appeal, he duly appeared before the Department of Justice hearing officer and had his full, further opportunity to present his entire case.

ARGUMENT

I

Petitioner's Affirmative Proposal to Contribute "to the war effort" by Farming, Together With Other Indications of Insincerity, Afforded Ample Basis for Disbelief of His Assertion That He Was Conscientiously Opposed to War, Including Noncombatant Service.

The instant case presents a clear and relatively simple example of a proper basis in fact for disbelief of a claim of conscientious objection. It differs from *Gonzales* v. *United States* and *Simmons* v. *United States,* now before this Court (Nos. 69 and 251), in that the government does not here question, as it does in those cases, that petitioner

is a sincere Jehovah's Witness. In some respects it is similar to *Sicurella* v. *United States*, No. 250, in which there is discussed the question of whether certain sincerely-held beliefs of Jehovah's Witnesses are the type of religious opposition to war for which the statute grants exemption. In *Sicurella* it is the position of the government that opposition to a particular war, no matter how sincerely based on religious grounds, is not sufficient to warrant exemption where the registrant does not manifest opposition to all wars but reserves the right to fight in future wars approved by Jehovah, and where his objection to service is in reality an objection to any type of governmental inroad upon his part-time religious activity. Those factors are present in this case and are extensively argued by petitioner. It is the government's position that, taking petitioner's utterances at face value, they show only qualified opposition to current conflicts—reserving the right to participate in a war which he or his sect may deem, like early Bible wars, sanctioned by Jehovah.[7] Also, petitioner's own statements establish that the true essence of his claim is opposition, not to war, but to any interference with such time as he

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[7] Thus, petitioner believes in the use of force "at the command of Almighty God" and such a command, like the remainder of his religious belief, would be obtained from his study of the Bible and the advice of the Watchtower society (R. 24). He extensively denied that he is a pacifist (App. to Pet. Br.).

deems fit to devote to his religious activities.[8] If the question were reached, it would be the government's position that petitioner has not shown invalidity in his classification for these reasons, set forth at more length in the government's brief in *Sicurella*. But it is unnecessary to reach the *Sicurella* question in this case. Each Jehovah's Witness, according to the principles of the sect, is required to determine for himself the specific question of his position on war (see *Gonzales* v. *United States*, No. 69, this term, R. 57, *United States* v. *Taffs*, O.T. 1953, No. 576, R. 70-71), and the Department of Justice has always recognized that it is the individual's own beliefs which are controlling. It is the government's position that in this case the registrant has not shown even the type of specific present conscientious objection which appears in *Sicurella*, since he was not even opposed to supporting the conflict existing at the time of his classification.

The conclusion that the petitioner had not demonstrated a genuine objection to war was unanimous at all stages of the administrative process, with the single exception of one hearing officer. Both the local selective service board and the Department of Justice specifically adduced facts showing the basis

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[8] Thus, petitioner states that he cannot turn aside from "superior duties" (R. 27). He must preach the Gospel (R. 31). He says that "the work that I now do is of greatest universal importance therefore I could not take part in a conflict of national or even international importance" (R. 32).

for their unwillingness to rely upon petitioner's sincerity.

The report of the Department of Justice specified two elements occasioning distrust. First, petitioner, although claiming religious abhorrence of war even to the extent of noncombatant service (R. 38, Pet. Br. 11, 15-16, 28), nevertheless affirmatively urged upon the local board his willingness and desire to "contribute" to the "war effort" by farming. Petitioner thus actively sought an exemption upon the very basis of contribution to the war effort—an exemption diametrically inconsistent with one based upon abhorrence of war. The true objector to war does not voluntarily do something which he considers to be a contribution to the war effort, if he is willing to participate in noncombatant service it is only because he truly believes that that service is so indirect as *not* to be a contribution to war, but a contribution instead to the healing of war's effects, and the like. Petitioner, on the other hand, extolled his proposed contribution to the war effort, but still asked the board to believe his protestations that he was opposed, not only to combat, but even to noncombatant service.[9] Petitioner's repeated efforts in his brief (see, for example, Br. 47-48) to represent the position of the courts below and that of the

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[9] Petitioner's reference (Br. 24, 47) to Abraham Lincoln's extolling of the value of the agricultural work of objectors overlooks the fact that this extolling of the contribution was by one who favored and was prosecuting the war, and did not come from the mouth of someone supposedly opposed to war.

government as a rejection of the claim of conscientious objection by anyone working as a farmer is a complete misconception of the above distinction between an indirect, unintentional assistance of war effort, and a conscious, intended and expressed willingness to contribute to "the war effort" so long as the selective service board bows to the claimant's choice of the type of contribution.[10] The urging of an affirmative willingness to contribute to war impugns the candor of one claiming religious objection to war, and more emphatically is this true where the claim is religious objection, not to combat, but also to noncombatant service.

The Department of Justice also noted that petitioner, after earnest protestation of ambition to become a farmer and "devote all my time to farming" was pressing, within less than two months, a baseless claim to full exemption in the vocation of an ordained minister (*supra*, p. 9).[11] The suspiciousness of petitioner's claim that he was an ordained

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[10] Thus, petitioner phrases it in the brief (Br. 10) as if he were only "willing" to produce food that "might be held to be" indirect participation in the war effort. It was not at all something that "might be held" a contribution to the war effort. It was the petitioner himself who was asserting and urging that his proposed work *would be* and *was intended to be* a contribution "to the war effort."

[11] The letter of the Department of Justice (R. 36) also notes the failure of petitioner to sign Series I(A) or I(B) of the Special Form for Conscientious Objectors (*supra*, p. 4, n. 1). This fact is apparently not adduced as among the items "believed to be incompatible with a sincere conscientious objector claim." It accordingly does not call for the repetitious and extensive argument of petitioner that the failure to fill out the form is of no moment (Br. 17, 21, 38-39).

minister was noted by the local board as well. The board's summary pointed out that the claim was supported only by "some paraphernalia from the Watchtower Association" and an assertion by petitioner that a Jehovah's Witness was an ordained minister upon commencing the distribution of literature.[12]

To these grave implications of lack of candor are to be added the observations contained in the local board's summary of petitioner's appearance before it, noting that petitioner, two weeks after being classified 1-A, gave up a factory job which he had held for three years and stated that he intended to get his father's farm into shape—a farm that had not been worked as a farm for 23 years. The distrust engendered by such a patent effort to shore up an unfounded claim for agricultural exemption cannot be compartmentalized as somehow inapplicable to other utterances of petitioner, especially the very subjective utterances espousing a claim of conscientious objection.

Petitioner argues that the claiming of one exemption does not constitute a waiver of another (Br. 21, 39-40). But neither the Selective Service System nor the Department of Justice have concerned themselves with a waiver. What was actually involved was the evidentiary effect of petitioner's succession of *inconsistent* claims, damaging to any confidence in petitioner's candor or sin-

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[12] Petitioner was not baptized until half a year after the time of this statement to the local board (*supra*, p. 6).

cerity. He was not to be deprived of asserting all properly available grounds of exemption, but his record is in no sense to be equated (as petitioner seeks to do, Br. 39) with that of one who can be simultaneously a "farmer, judge and a father". Petitioner claimed deepseated religious objection to combat and noncombatant service, the while extolling his proposed agricultural service as a contribution to the war effort. This was never relied upon by the selective service board or the Department of Justice as a technicality of administrative pleading, but was considered significant on the basic and ultimate question of sincerity.

In the face of the foregoing record, even if it were permitted the courts to substitute their judgment on the weight of the evidence for that of the designated administrative agency—contrary to *Dickinson* v. *United States*, 346 U. S. 389, 394—it would be difficult to arrive at an independent conclusion *de novo* that petitioner's inconsistencies and evasions had not vitiated the trustworthiness of his claim of the necessary deep religious objection to war. When, in addition, due observance is accorded to the mandate of the statute making "final" the last appellate decision of the administrative process, it is even more difficult to take the further step and say that a selective service board is to be prohibited from finding in such a record of conflicting utterances a basis in fact for the obvious conclusion that petitioner did not have the requisite genuine religious objection to war.

The challenge here presented can accordingly be nothing more than an attempt to dispute the weight to be accorded to the grounds adduced—an attempt to state that the administrative officers should not have disbelieved petitioner—and in effect to transfer to the courts the administrative function specifically delegated by Congress to the selective service system. The entire end product of an extensive and careful administrative process cannot so readily be reduced to a complete nullity and the issue subjected to a virtual trial *de novo* in the courts.

Petitioner assumes (Br. 20-21, 36-38) that the recent decision of this Court in *Dickinson* v. *United States,* 346 U. S. 389, is here applicable to require some additional element of extraneous evidence beyond petitioner's own conduct, before the selective service board could find him insincere. No such interpretation is suggested by the decision. Dickinson's claim was that he was a minister. He produced facts as to the amount of time devoted to his religious activities, and as to the aspects of leadership involved in those activities, notably his status as a Company Servant in the sect's hierarchy. This Court found these facts uncontroverted, and it was in this connection—and only in this connection—that this Court stated that the facts could not be disbelieved without further factual support for the disbelief.

The instant case, that of a claim of the peculiarly subjective inner belief of a conscientious objection, presents a different demarcation between what is

fact and what is weighing of fact. The ultimate conclusion in the instant case relates to a matter of inner belief, and not one of outer activity such as —in the case of a minister—the amount of time devoted to preaching and the fact of leadership within the sect. As pointed out in the government's brief in *Simmons* v. *United States*, No. 251, this term, this difference is clearly recognized in the special provision made by Congress for an investigation and recommendation by the Department of Justice in the case of conscientious objection.

Of course, the actual existence of a true conscientious objection, like that of other subjective matters, is determined by the weighing of external manifestations and is in that degree dependent upon external facts. In the instant case, such facts consist of petitioner's observable conduct—his utterances and his acts under given sets of circumstances. There is no disbelief of the observable, objective facts and hence no question, as there was in *Dickinson*, *supra*, concerning unfounded disbelief of facts which a board could investigate and contravene by other facts. Petitioner's letter, urging his will and ability to contribute to "the war effort", is a fact, in writing. Similarly, his virtually simultaneous claim of farming as his life-work and of ordained ministry as his life-work is an undisputed fact. Nor is there any dispute as to the fact that, in point of time, petitioner, two weeks after classification as I-A, left a job of three-years' standing—a job which would not have the exemption pos-

sibilities of an agricultural employment. None of these facts are disputed. The disagreement arises only as to the weight of these facts as a basis for distrust of petitioner's claimed inner beliefs. But this weighing of facts to reach the ultimate conclusion is peculiarly the function delegated to the administrative process. The ultimate conclusion as to sincerity cannot be subjected by improper analogy with *Dickinson, supra,* to the impossible test of whether the board can bring forward some outright admission by petitioner that he had falsified or grossly overstated inner feelings, for such an admission would rarely if ever be unearthed by even the most extensive investigation process. This Court in *Dickinson, supra,* far from having foreclosed the decision here supported, has pointed out exactly the contrary in its caveat that the courts will *not* apply "a test of 'substantial' evidence" (346 U. S. at 396).

The issue here is not whether some other board might have considered petitioner's various positions as reconcilable with conscientious objection. The issue is not how this Court might interpret petitioner's acts and words *de novo.* The only issue is whether the board which had primary responsibility for making the decision could reasonably consider any fact of record as indicating that petitioner did not have the necessary deep religious abhorrence of war which the statute requires. For the reasons set forth, we think it is clear, not only that the board reasonably could, but that it reason-

ably should, have reached that conclusion. A person who designates and urges his proposed civilian work as actually being a real contribution to war forecloses his own contention that he is opposed to war, to say nothing of his additional claim that he is also opposed to noncombatant service.

This Court firmly reiterated the limitations on court review in such matters in *Dickinson* v. *United States*, 346 U. S. 389, 394, but the fact that the Court found an error in the classification process in that case has since been unduly magnified, while the Court's warning on the limitation of court review has been ignored. We respectfully suggest that there is need for an emphatic and authoritative statement of the intrinsic limitations of the *Dickinson* decision. This is not to say that there should be the slightest diminution in judicial redress in case of a classification without basis in fact, but it is to point out the equal danger of a too tempting, wide-open door leading the insincere or wavering registrant to assume that, by merely claiming total absence of basis in fact, he will be entitled to have a court second-guess the administrative board—the board which actually saw the registrant and questioned him on the complex conclusion as to the inner sincerity of his espousals of conscientious objection. It should be made clear that while, under *Dickinson*, objective facts may not be disbelieved by a board without the adducing of a basis for the disbelief, the decision in *Dickinson* in no sense imposes a requirement that, when a selective service board obtains and weighs various and conflicting objective bases

upon which it reaches its conclusion as to the subjective, inner belief of a registrant, the board is additionally required, before holding against the claimed exemption, to find some outright admission of the registrant that he was insincere.

II

Petitioner Was Accorded a Full Personal Appearance, Was Personally Notified of the Decision of the Board, and Was Afforded Full Subsequent Steps of Appeal and Additional Personal Appearance Before a Hearing Officer.

Petitioner attempts to find a procedural impropriety on the basis of assumptions made possible, if at all, only by the fact that the selective service board used lay language and failed to put into precise words every detail of its deliberation and ultimate decision. Basically, petitioner contends that the local board assumed that it was foreclosed from changing petitioner's classification because petitioner had included with his request for a personal appearance a request for an appeal. The short answer is that the board clearly entertained no such misapprehension, for it went ahead with the personal appearance and with a decision, which it assuredly would not have done if it had labored under the impression that it had lost jurisdiction.

Petitioner's contrary contention is extracted from a purported fragmentary remark of the board chairman, dubiously recalled a year later at the trial by the board clerk, with words put in her

mouth by petitioner's counsel.[13] Apparently the trial judge clearly sensed the fact that the chairman's remarks (whatever they were), made at the end of the hearing rather than before, had no such meaning as that sought to be developed by petitioner, for he specifically found (R. 54):

> The clerk of the local board testified that when defendant completed his presentation, *the members of the board discussed the matter* and the board chairman *then* told the registrant that his I-A classification would remain the same, his appeal would be honored; that if he was found acceptable after physical examination for the armed service his file would be forwarded to the appeal board. [Italics supplied.] [14]

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[13] "Q. Isn't it a fact that at that time Mr. Witmer was told the matter was out of the hands of the local board because he had taken an appeal?

"A. That is correct.

"Q. In other words, the local board could not do anything at that time because he had taken an appeal, isn't that what you told him or what the board chairman told him?

"A. Yes sir, that is correct." (R. 6.)

But compare:

"Q. Isn't it also a fact that at that time they agreed that because of his appeal, the matter was out of their hands and they couldn't change his classification?

"A. That I don't remember." (R. 10.)

[14] Petitioner's misapprehension of the matter is additionally apparent when the fragmentation of the testimony in the printed record is repaired by recourse to the full transcript, of which a copy is lodged with the Clerk of this Court. But there is in no event any justification for petitioner's carrying

Upon the tenuous assumption that the board felt itself unable to grant a hearing, petitioner places a broadening inverted pyramid of further argument that there was a "refusal to reopen and reclassify." Petitioner contends that because the board, in its summary, ruled specifically only on his additional claim of ministry, then advanced for the first time, that it considered nothing else (Br. 10 [III], 53). But the board in its written summary (R. 33-34) enumerated three new matters of fact presented at the personal appearance, *i. e.*, that petitioner had left his work at the factory two weeks after being classified I-A; that petitioner, after his father's farm had not been worked for 23 years, now proposed to get the farm "in shape"; and that petitioner now claimed to be a minister, relying upon an ordination by the distribution of literature. The board, of course, did not summarize repetitions of matter already presented, since the written summary, under the regulations, is only for "further information" presented at the personal appearance (Regulations, *infra,* p. 32). Similarly, the board having theretofore specifically passed upon two of the classifications urged upon it, *i. e.*, those of

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of his assumptions to the extreme of asserting the assumptions as fact, in his Statement of the Case (Br. 14). He asserts that the "undisputed evidence" establishes that petitioner "was told" that because he had concurrently asked an appeal "no action would be taken upon his case" and "the classification would not be changed." Nothing of the kind appears—petitioner was simply told, after personal appearance had been granted him and decision rendered, that his next step would be with the appeal board.

agricultural worker and conscientious objector, and upon reconsideration finding nothing to warrant a different conclusion, restricted its specific written reference to the ministerial classification then claimed for the first time. Concerning this new claim, the board recorded its finding "not sufficient evidence to warrant a 4-D [ministerial] Classification" (*supra*, p. 7).

Petitioner now seeks to draw from this specific reference to the new claim a complete *non sequitur*, namely that the board considered nothing else, and thereby seeks to develop a purported conflict with the earlier case of *United States* v. *Stiles*, 169 F. 2d 455, in the same circuit, in which a board had requested an affidavit from a registrant, informed him it "would be acted upon," and then never apprised him of the taking of any action. In the instant case, the record discloses that petitioner presented a lengthy statement at the hearing in which he reiterated, *inter alia*, the basis of his conscientious objector claim (*supra*, pp. 5-6), that he presented a lengthy printed argument asserting the claim of the Jehovah's Witnesses that they are conscientious objectors (*The Watchtower*, Feb. 1, 1951), and that, after petitioner had completed his presentation, the board members discussed the decision among themselves (*supra*, p. 23). It is thus completely without basis to assume that the board members mechanically screened out of their thoughts the agricultural and conscientious objection classifications which were clearly within petitioner's presentation at the hearing.

Petitioner's entire present argument appears, in short, to be an attempt to make capital of the failure of a board of laymen to put into writing every detail of deliberation and ultimate decision. It is wholly insubstantial for petitioner now to contend that when the board had heard him out, asked questions, discussed the case among themselves, and told him "that his I-A classification would remain the same" (R. 5), this was no decision or classification but merely a refusal to act. The contention is aptly disposed of by the Court of Appeals below (R. 61), relying upon its *en banc* decision in the companion case of *United States* v. *Hagaman,* in which the following appears (R. 72):

> It is one thing, however, to protect a man when he is prejudiced by the failure of administrative authorities to observe the precautions taken to guard his rights. It is another thing to create an administrative procedure, designed to be handled by volunteer laymen in communities throughout the nation, as technical and ritualistic as common law pleadings. We have said in an earlier opinion that a registrant is not obliged to make his points with his draft board in the fashion required of a well-trained lawyer, *United States ex rel. Berman* v. *Craig,* 207 F. 2d 888 (C.A. 3, 1953). It is likewise true that the board's proceedings do not need to be recorded with the meticulous accuracy with which an experienced corporation counsel draws a set of corporate minutes.

There can be no real doubt from this record that all three of petitioner's claims for deferment or exemption from military service were considered by the board, and that the board clearly decided and informed petitioner that his case merited none of such classifications.[15]

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[15] Petitioner has receded from the statement in his Petition (Pet. 4, 32-33) that the Court of Appeals "held that because the local board told [petitioner] it was not going to reopen and reclassify, * * * such [notice and his appeal] cured the deprivation of a right to a full and fair hearing." But petitioner now intimates as much by repeated indirect assumptions that the courts below or the government reasoned in such fashion (Br. 10 [III], 19, 26-27, 49-51). Needless to say, the Court of Appeals made no such holding and the government makes no such contention, for there was no refusal to reopen. In the Court of Appeals, petitioner had made a further contention, now virtually abandoned (Petitioner's Brief in the Court of Appeals, pp. 1, 19-22), that because he was not served an additional written notice of his retention in classification I-A, he had been deprived of a right. The Court of Appeals approved the District Court's opinion, which pointed out, as held in *Martin* v. *United States*, 190 F. 2d 775, 779 (C.A. 4), certiorari denied, 342 U.S. 872, that the clear, personal notice to petitioner at the hearing, together with the perfecting of the appeal, precluded any prejudice to petitioner from the absence of a further written notice (R. 58-59, 61-62). But the Court of Appeals at no time subscribed to the purported fact, now suggested by petitioner, that the selective service board had refused to reconsider petitioner's classification. The court approved, instead, a finding that there had been a true reconsideration, and a basis in fact for again holding petitioner to be in classification I-A (R. 56, 58-59, and see, specifically, the cases distinguished by the District Court at R. 59, fn. 5).

CONCLUSION

For the above reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

SIMON E. SOBELOFF,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

JOHN F. DAVIS,
Special Assistant to the Attorney General.

BEATRICE ROSENBERG,
J. F. BISHOP,
Attorneys.

JANUARY, 1955.

APPENDIX

Universal Military Training and Service Act, 62 Stat. 604, 612, 619, 622; 64 Stat. 1074; 65 Stat. 75, 86:

Section 6(j) [50 U.S.C. App. 456(j)]:

> Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the main-

tenance of the national health, safety, or interest as the local board may deem appropriate * * *. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *. If after such hearing the Department of Justice finds that his objec-

tions are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. * * *

Section 10(b)(3) [50 U.S.C. App. 460(b)(3)]:

* * * [L]ocal boards * * * shall, under rules and regulations prescribed by the President, have the power within the respective jurisdictions of such local boards to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this title, of all individuals within the jurisdiction of such local boards. The decisions of such local board shall be final, except where an appeal is authorized and is taken * * *. The decision of * * * appeal boards shall be final in cases before them on appeal unless modified or changed by the President. * * *

Section 12(a) [50 U.S.C. App. 462(a)]:

Any * * * person * * * who * * * refuses * * * service in the armed forces * * * or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules,

regulations, or directions made pursuant to this title * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

Selective Service Regulations, Title 32 C.F.R. (1949 ed.), Section 1624.2:

Appearance before local board. * * *

(b) At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing, or, if oral, shall be summarized in writing and, in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. * * *

(c) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board shall consider the new information which it receives and shall again classify the regis-

trant in the same manner as if he had never before been classified.

(d) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board, as soon as practicable after it again classifies the registrant, shall mail notice thereof on Notice of Classification (SSS Form No. 110) to the registrant * * *.

(e) Each such classification shall be followed by the same right of appeal as in the case of an original classification.

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